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No. 37133-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

REBECCA ANNE CLEMMER,

Appellant.

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

The Honorable Judge Patrick A. Monasmith

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Rebecca Anne Clemmer's vehicle struck the vehicle being driven by Erik Bruhjell, and Mr. Bruhjell died as a result of the accident. A blood sample taken from Ms. Clemmer tested positive for hydrocodone. The State charged Ms. Clemmer with one count of vehicular homicide, alleging she drove while under the influence, or drove in a reckless manner. The case proceeded to a jury trial, and Ms. Clemmer was found guilty as charged. Ms. Clemmer admitted she took hydrocodone that day, but disputed that it affected her driving.

Ms. Clemmer now appeals, arguing the trial court erred in admitting into evidence statements she made to a law enforcement officer, because the statements were made after she made an unequivocal request for an attorney. Ms. Clemmer also argues she was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to improper opinion testimony by a drug recognition expert concerning impairment, and failed to object to the admission of highly prejudicial evidence regarding intravenous drug use. Ms. Clemmer also argues the State committed misconduct in its rebuttal closing argument by shifting the burden of proof to her. She argues that if this Court determines these errors standing alone do not warrant reversal, then the cumulative effect of the errors warrants reversal.

Ms. Clemmer also challenges the imposition of four conditions of community custody and a scrivener's error in the judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the following finding of fact following the 3.5 hearing:

Trooper Senger properly advised [Ms. Clemmer] of *Miranda* [and] [Ms. Clemmer] made only an ambiguous request for an attorney. Detective Rippee properly advised [Ms. Clemmer] of *Miranda* [and] [Ms. Clemmer] waived those rights prior to making statements.

(CP 217).

2. The trial court erred in ordering that the statements made to Detective Rippee are admissible for the purposes of 3.5. (CP 217).
3. The trial court erred in admitting Ms. Clemmer's statements to Detective Rippee at trial, and the error was not harmless beyond a reasonable doubt.
4. Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to improper opinion testimony by Trooper Senger concerning impairment.
5. Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to the admission of evidence regarding intravenous drug use on evidentiary grounds.
6. The State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by shifting the burden of proof to Ms. Clemmer.
7. Cumulative error existed at trial, depriving Ms. Clemmer the right to a fair trial.
8. The trial court erred by imposing the following community custody conditions: (1) requiring Ms. Clemmer to pay supervision fees as determined by DOC; (2) requiring Ms. Clemmer to obtain an alcohol evaluation and comply with any treatment recommendations; (3) prohibiting Ms. Clemmer from associating with known abusers of illegal drugs; and (4) prohibiting Ms. Clemmer from possessing alcohol containers.

9. The judgment and sentence contains an error that should be corrected: it requires notice be given to the Department of Licensing to revoke the driving privileges of a juvenile.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in admitting Ms. Clemmer's statements to Detective Rippee at trial, and the error was not harmless beyond a reasonable doubt.

Issue 2: Whether Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel.

Issue 3: Whether the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by shifting the burden of proof to Ms. Clemmer.

Issue 4: Whether cumulative error requires reversal for a new trial where the admission of Ms. Clemmer's statements to Detective Rippee, the denial of her Sixth Amendment right to effective assistance of counsel, and the State's misconduct did not afford Ms. Clemmer a fair trial.

Issue 5: Whether the trial court erred by imposing four unauthorized community custody conditions.

Issue 6: Whether the judgment and sentence contains an error that should be corrected: it requires notice be given to the Department of Licensing to revoke the driving privileges of a juvenile.

D. STATEMENT OF THE CASE

On July 20, 2018, Rebecca Anne Clemmer was driving northbound on State Route 395 between Spokane and milepost 185 in Stevens County. (RP 183, 186). Around 6:30 p.m., near milepost 185, Ms. Clemmer's vehicle crossed over the center line, over the southbound lane of travel, and onto the southbound shoulder, where she struck another vehicle, a Black Mazda 3, that had been

traveling southbound. (RP 183, 191, 214, 285-286, 294-296, 302, 307-310, 335, 472-473, 482-484, 510-511).

There were black tire friction marks starting in the southbound lane of travel and moving towards the right-hand shoulder, which indicated the Black Madza 3 applied its brakes and was moving into the shoulder. (RP 296-297, 308, 508). There were no tire friction marks showing braking by Ms. Clemmer's vehicle. (RP 286, 297, 310, 512).

The occupant of the Black Madza 3, Erik Bruhjell, was deceased at the scene. (RP 186-188, 215, 228, 240, 246-247, 765). An autopsy was conducted of Mr. Bruhjell by Dr. John Howard. (RP 256-257). Dr. Howard determined the cause of death was blunt head, chest, abdominal and extremity injuries, caused by the motor vehicle accident. (RP 267).

Eyewitnesses observed the accident, and Ms. Clemmer's driving prior to the accident. (RP 366-390, 462-488, 521-536). According to witnesses, Ms. Clemmer was crisscrossing from the right side of the highway to the left side of the highway, and back to the right, for several miles. (RP 367-368, 371, 480-481, 522, 530-534). Witnesses then observed Ms. Clemmer stop her vehicle in the middle of the northbound lane of travel, where she sat and some food. (RP 368-369, 376-380, 388-389, 463-464, 472-473, 480-481, 522-523, 531, 534).

According to witnesses, Ms. Clemmer resumed driving northbound, and this is

when she drove across the highway and hit Mr. Bruhjell's vehicle. (RP 369, 464-465, 472-474, 482-484, 523-526, 531-532).

Washington State Patrol Trooper Don Field arrived at the scene of the accident and spoke to Ms. Clemmer, who was in her vehicle, located in the middle of the roadway. (RP 186, 191-192). Ms. Clemmer was in pain and being attended to by medical personnel. (RP 191-192, 204-205). Trooper Field asked Ms. Clemmer why she was driving so fast, and she told him "[s]he had been in a hurry to get her kids from daycare." (RP 191-192, 209-210). He also asked her why she stopped in the middle of the roadway, and "[s]he said that she was not in the middle of the roadway." (RP 192).

Ms. Clemmer was transported from the scene to Sacred Heart Hospital in Spokane, by helicopter, because her blood pressure was starting to fall. (RP 205-206, 231-233, 274-275; Pl.'s Ex. 53). She was given 50 micrograms of fentanyl, an opiate, during the flight. (RP 592-593, 607-608, 611-612, 635-636, 671, 680; Pl.'s Ex. 53).

Upon Ms. Clemmer's arrival at the hospital, her treating physician Dr. Robert Hagerty ordered a blood draw, which was done at 7:48 p.m. (RP 585-588, 625, 671; Pl.'s Exs. 64, 65). A test of this blood yielded a result of hydrocodone, 0.077 mg. per liter. (RP 725, 749, 751-752; Pl.'s Ex. 43). This blood was not tested for fentanyl. (RP 725-726, 748). It was tested for hydromorphone, and none was detected. (RP 748).

Ms. Clemmer was given her first does of hydromorphone, an opiate, at the hospital at 7:51 p.m. (RP 593-594, 600, 608, 612, 671; Pl.'s Ex. 39).

Washington State Patrol Trooper Ryan Senger, a drug recognition expert (DRE), arrived at Sacred Heart Hospital following the accident, at approximately 7:30 p.m. (RP 397-404, 424, 441-442). After observing Ms. Clemmer and speaking to other officers, Trooper Senger placed her under arrest for vehicular homicide. (RP 405-411).

The State charged Ms. Clemmer with one count of vehicular homicide, alleging she drove while under the influence, or drove in a reckless manner. (CP 7-8). The trial court made a determination of indigency, finding Ms. Clemmer “[e]ligible for a public defender at no expense.” (CP 407-409).

The trial court held a 3.5 hearing, addressing Ms. Clemmer’s statements made to Trooper Field, Trooper Senger, and Detective Jordan Rippee. (CP 217; RP 21-52). Trooper Senger testified he went to Sacred Heart Hospital to speak to Ms. Clemmer. (RP 31). He testified he placed her under arrest for vehicular homicide, and advised her of her constitutional rights. (RP 34). He testified “[a]fter I gave her the warnings I asked if she understood and she advised that she did.” (RP 34). Trooper Senger then testified:

[Counsel for State:] All right. And what did she say - - when you asked her if she’d talk to you.

[Trooper Senger:] She – she asked about speaking to an attorney and said that she should speak with one first.

(RP 34-35).

Trooper Senger testified he interpreted this statement as “[s]he didn’t make a specific - - request . . . at that point in time to speak with an attorney . . . [,]” but he did not ask Ms. Clemmer any more questions. (RP 35-36).

Detective Rippee testified he also went to Sacred Heart Hospital, and that Trooper Senger was present there. (RP 39). He testified that he asked Ms. Clemmer if she was willing to speak to him, and she said that she was, and did not reference wanting to speak to an attorney. (RP 40). Detective Rippee testified he subsequently read Ms. Clemmer her *Miranda* warnings. (RP 40-41). He testified Ms. Clemmer agreed to speak with him, and waive her rights. (RP 42). Detective Rippee then questioned Ms. Clemmer regarding the accident. (RP 42-45).

The trial court ruled Ms. Clemmer’s statements to the three officers admissible. (CP 217; CP 49-52). The trial court issued a written order, including findings. (CP 217). The trial court found:

Trooper Fields did not have [Ms. Clemmer] in custody when he asked any questions. Trooper Senger properly advised [Ms. Clemmer] of *Miranda* [and] [Ms. Clemmer] made only an ambiguous request for an attorney. Detective Rippee properly advised [Ms. Clemmer] of *Miranda* [and] [Ms. Clemmer] waived those rights prior to making statements.

(CP 217).

The case proceeded to a jury trial. (RP 170-870).

Defense counsel made successful motions in limine to exclude evidence that Ms. Clemmer was in law enforcement’s CAD system for prior drug use, and information in her medical records of past cocaine use and treatment. (RP 64-66).

The trial court found the latter evidence “prejudicial, - - not really probative of very much.” (RP 66).

At trial, witnesses testified consistent with the facts stated above. (RP 181-797). In addition, Trooper Senger testified regarding his training as a DRE. (RP 398-402). He testified that he went to Sacred Heart Hospital, and “it was my job . . . to contact [Ms. Clemmer] and make an assessment of injuries as well as gather information for the collision report and determine if there was impairment involved.” (RP 404). He testified he stood outside the trauma room where Ms. Clemmer was receiving medical treatment, and he observed “[s]he was - - slurring her words very heavily as she spoke to a degree where - - it was unable to be understood what she was saying most of the time.” (RP 405-406). Trooper Senger testified as follows regarding his first contact with Ms. Clemmer: “I noticed that her eyelids were very droopy - - tosis, is what it’s referred to as in the drug recognition expert world - - and that she had - - she was labored in keeping her eyes open.” (RP 406-407). He testified she was able at times to open her eyes, and he observed that they were watery. (RP 407). Trooper Senger testified that as a DRE, Ms. Clemmer’s droopy and watery eyes “[c]ombined with - - her other behaviors it’s indicative of impairment.” (RP 409).

Trooper Senger further testified he contacted Washington State Patrol Sergeant Dustin Drout, and his investigation proceeded:

[Counsel for State:] Okay. And again, the purpose of the information that you're gathering from Sgt. Drout is to assist you in making your evaluation as a DRE at this time?

[Trooper Senger:] Yeah. It's important to know, even as a regular officer, that -- the circumstances that led up to the collision, and if there's any, you know, other circumstances that could have contributed to it. So, yeah, it's part of it.

[Counsel for State:] Did you learn information that eventually contributed to your decision -- about whether or not Ms. Clemmer was under the influence?

[Trooper Senger:] Yes.

[Counsel for State:] What did you learn.

[Trooper Senger:] So, Sgt. Drout said that she was involved in a collision, a head-on collision that occurred on a shoulder, which he said was unusual, due to the circumstances. He advised me that there were multiple, approximately four 9-1-1 calls reporting her vehicle as erratic prior to the collision occurring. He advised me that -- a driver was deceased in -- the other vehicle involved in the collision, and that when other troopers at the scene were trying to identify her and gather information for the collision report they observed pills in her purse.¹

[Counsel for State:] Okay. Okay. So, at that point had you -- did you -- come to a conclusion based on your interactions with her and the information that you had garnered?

[Trooper Senger:] Yes.

[Counsel for State:] What was your conclusion.

[Trooper Senger:] Based on everything I made a determination that she was impaired.

(RP 409-411).

Defense counsel did not object to this testimony from Trooper Senger. (RP 404-411).

Trooper Senger acknowledged he does not know if Ms. Clemmer was under the influence of drugs that were administered by the hospital prior to his

¹ The fact that white pills were found in Ms. Clemmer's purse came in at trial, but there was no evidence presented as to what these white pills were. (RP 201-203).

arrival. (RP 426). On cross-examination, Trooper Senger testified he does not believe the impairment he observed was caused by the Dilaudid given to her by the physicians. (RP 432).

On re-direct, Trooper Senger testified:

[Counsel for State:] Okay. And I just want, I guess, to be clear. It was your conclusion that she was impaired and it wasn't due to anything she'd been given at the hospital.

[Trooper Senger:] That's correct.

(RP 446).

Defense counsel did not object. (RP 446).

Trooper Senger testified that he obtained a search warrant for a blood draw from Ms. Clemmer, and he observed the blood draw. (RP 411-416). He testified there were four separate attempts to draw Ms. Clemmer's blood, and that a fourth attempt was successful, out of a hand "which is not common for a blood draw usually." (RP 415, 445). The results of this blood draw were not admitted at trial. (RP 457).

Trooper Senger testified he was trained, as a DRE, about how specific drugs are used, including intravenously. (RP 416-417). He testified he was trained on how intravenous drug use will hinder drawing blood. (RP 418). He testified that it can make it more difficult to draw blood. (RP 418-419). Trooper Senger then testified as follows:

[Counsel for State:] Okay. So while that blood draw was happening did you have an ability to observe Ms. Clemmer physically.

[Trooper Senger:] I did.

[Counsel for State:] And did you observe anything that struck you in your training and experience as a DRE on her.

[Trooper Senger:] Yes.

[Counsel for State:] What did you observe.

[Trooper Senger:] I noticed several old scarring portions of where -- it was consistent with intravenous drug use, as well as fresh or partially fresh scarred, scabbed over, needle poke pock marks -- we commonly refer them (inaudible).

[Counsel for State:] Did you notice anything else?

[Trooper Senger:] There was bruising in the crook of her arm which would be consistent with -- through training and experience of -- maybe multiple attempts of being unsuccessful of -- you know, sticking a needle into a vein or an arm.

[Counsel for State:] Okay. She had just been in a collision. Did any of these look like they could have been caused by that collision.

[Trooper Senger:] While she did have some injuries, this specifically was -- did not believe was caused by the collision itself.

[Counsel for State:] Okay. And I know you mentioned bruising that could have been from multiple failed attempts. Could this -- was this bruising from the attempts that they had just tried to make.

[Trooper Senger:] I don't believe so, no.

(RP 419-420).

Defense counsel did not object to this testimony from Trooper Senger. (RP 411-420).

On cross-examination, defense counsel questioned Trooper Senger about this testimony. (RP 426-432, 437-438). This questioning included the following:

[Defense counsel:] You also tried to convince this jury, I believe, that my client is an intravenous, illegal intravenous drug user. I think that's what you were implying. Is that true?

[Trooper Senger:] Wasn't directly implying, but it could be perceived that way.

[Defense counsel:] You said you observed what you thought were injection sites from the illegal use of drugs, mainly -- possibly heroin. Isn't that what you said?

[Trooper Senger:] I didn't mention anything about heroin, but I saw indications that that may be -- she may have been using intravenously, yes.

(RP 426-427).

Trooper Senger testified he is not making a determination that the intravenous injection sites were used for illegal drugs. (RP 443).

Brittany Galloway, a phlebotomist, testified she drew blood from Ms. Clemmer, pursuant to the search warrant obtained by Trooper Senger. (RP 448-451; Pl.'s Ex. 45). Ms. Galloway testified as follows:

[Counsel for State:] Okay. When you were drawing blood did you make any observations of - - on Ms. Clemmer?

[Ms. Galloway:] Yes.

[Counsel for State:] What were those?

[Ms. Galloway:] Noticing marks on her left A/C that could possibly be IV drug user marks.

[Counsel for State:] Okay. And do you know if that makes it more or less difficult for you to draw blood from somebody.

[Ms. Galloway:] More difficult.

(RP 452).

Defense counsel did not object. (RP 452).

On cross-examination, defense counsel asked Ms. Galloway about these marks, and Ms. Galloway testified she observed the following on Ms. Clemmer's arms: "[i]n her left A/C there were marks that looked like an IV drug user mark."

(RP 458-459).

Detective Rippee testified he arrived at Sacred Heart Hospital at approximately 9:45 p.m., and interviewed Ms. Clemmer. (RP 315-322, 335). He

testified Ms. Clemmer stated that on the day of the accident, she was driving home from going to see her mother in Spokane. (RP 317-318). Detective Rippee testified Ms. Clemmer stated she stopped at Jack in the Box to pick up dinner, and that she ordered a Papa Joe. (RP 318-319). He testified this seemed strange to him, because “I know that Zip’s has Papa Joe’s, Jack in the Box does not.” (RP 318-319).

Detective Rippee testified he asked Ms. Clemmer if she remembered being in the collision, and she stated she did not remember it. (RP 319-320).

Detective Rippee testified he questioned Ms. Clemmer as follows:

[Counsel for State:] Okay. Did you ask her about any other substances.

[Detective Rippee:] I asked her if she takes - - took any - - excuse me - - any medications, to which she stated she did. She said she had chronic pancreatitis, and she was prescribed hydrocodone for that.

[Counsel for State:] Okay. Did you ask her anything more about - - when she said that she took that medication did you ask her if she took it that day?

[Detective Rippee:] I did. I asked her if she took it that day and she told me she took half of her dose around 12:30 p.m.

[Counsel for State:] Did you ask her what her dose was?

[Detective Rippee:] I did, to which she stated she did not know what her dose was.

[Counsel for State:] All right. Did you ask for any clarification.

[Detective Rippee:] I asked her what the prescription was for, and she stated it was a - - for hydrocodone, and that’s supposed to take 10 mg. twice a day. And when she told me that she was supposed to take it twice a day I asked her again if she took her doses that day.

[Counsel for State:] And what did she tell you.

....

[Detective Rippee:] She said she took one at 11:00 and one at 3:00.

[Counsel for State:] Now, at any time during this conversation about what she'd been doing that day did she mention her children to you?

[Detective Rippee:] She did not.

[Counsel for State:] Did she mention that she was in a hurry to pick up her kids from daycare.

[Detective Rippee:] She did not.

[Counsel for State:] Okay. Did you talk about if she had been tired on her way home at all to you?

[Detective Rippee:] She did not.

[Counsel for State:] All right. So, as a detective, she had mentioned at one point that didn't [sic] know her dose and then again that she did know her dose. She had some inconsistency. So as a detective what did you make about that, those - - inconsistencies during this conversation.

[Detective Rippee:] Based on the inconsistencies, I determined - - or, I believed she was either impaired, had some sort of a head injury from the crash, or her - - maybe that there was some deception behind her statement.

(RP 320-322).

Detective Rippee acknowledged Ms. Clemmer received two injections of hydromorphone prior to his arrival at the hospital, and that her medical records indicate she was treated aggressively with pain medications. (RP 336-337, 340; Pl.'s Ex. 39).

Detective Rippee testified he downloaded crash data retrieval (CDR) information from Ms. Clemmer's vehicle, which "records everything that occurs within a vehicle." (RP 330-331; Pl.'s Ex. 55). He testified the CDR shows that Ms. Clemmer's vehicle was traveling 70 miles per hour, from five seconds to half a second before the accident occurred. (RP 332-333; Pl.'s Ex. 55). He testified

the CDR also shows the brake switch was off during this time, meaning the brake pedal was not being pressed down. (RP 333; Pl.'s Ex. 55).

Ashley Krieger testified she observed Ms. Clemmer stopped in the middle of the northbound lane of travel, where she sat and some food. (RP 376-380). She testified she and her husband pulled up next to Ms. Clemmer's vehicle, and "when we were next to her, and looking and watching, she didn't even look at us." (RP 379). Ms. Krieger testified Ms. Clemmer "seemed very out of it . . . Just - - quietly looking ahead, eating a sandwich . . . The other thing we noticed was she seemed like she was in slow motion, as she was eating." (RP 383). She testified Ms. Clemmer looked dazed, and "I interpreted her to either be drunk or high or stoned, under the influence of something." (RP 384-385).

Ryan Krieger testified he pulled his car up next to Ms. Clemmer's vehicle when she was stopped in the northbound lane of travel, and stopped for approximately 30 seconds. (RP 387-389). He testified:

I pulled up beside, and I - - looked in the window and I saw - - I remember seeing a Zip's hamburger wrapper in one hand and a burger in the other. And I honked on my horn. The gal did not make eye contact, didn't look up. She was looking into her - - wrapper. And - - I just - - I honked, and I looked at my wife and I said, "This gal is completely stoned out of her mind."

(RP 388).

Chase Birchler testified he observed the accident, and Ms. Clemmer's driving prior to the accident. (RP 480-484). He testified that when Ms. Clemmer resumed driving after being stopped in the northbound lane of travel, she was not

driving straight, and “[i]t appeared like - - she was falling asleep or passing out and then waking up, re-correcting.” (RP 484). He testified “[m]y personal observation upon her driving for 20 miles, weaving in and out of incoming traffic, yes, there was some form of inebriation going on . . . [w]hether that was drugs, alcohol, or a medical condition I couldn’t tell you.” (RP 486).

Dr. Hagerty testified he treated Ms. Clemmer in the Sacred Heart Hospital emergency room following the accident. (RP 580-582; Pl.’s Exs. 73, 74; Resp.’s Ex. 101). He testified in examining Ms. Clemmer, he did not find any underlying injuries that could have caused the accident. (RP 595). He testified he reviewed some of her older medical records, and he did not see anything in this information to lead him to believe that she has an underlying medical condition, that could have contributed to sudden onset, to cause a motor vehicle accident. (RP 595-597, 648, 652, 654-655, 685-688).

Dr. Hagerty testified Ms. Clemmer has pancreatitis, and it usually causes severe pain, and profuse vomiting. (RP 657, 692).

Dr. Hagerty testified hydrocodone can be administered at different strengths, and “the type of pain, . . . and their body size, that helps us guide how we would adjust the medication dosing.” (RP 660). He testified physicians are encourage to not prescribe more than 90 mg. of any type of opiate in a 24 hour period. (RP 661). He testified hydrocodone is prescribed orally. (RP 659).

Dr. Hagerty testified that 7.5 mg of hydrocodone, twice per day, is a lower dose. (RP 662). Dr. Hagerty testified he has seen hydrocodone prescribed as 10 mg., twice a day, and that this is not outside the normal range. (RP 688). He testified that if someone is reporting taking 10 mg. at 11:00 and 3:00, “[t]hat’s within dosing parameters. That’s a pretty strong dose.” (RP 688). He testified that if a dose was taken at 3:00, he would expect the patient to still be experiencing the effects of the dose between 6:00 and 7:00. (RP 688-689).

Dr. Hagerty testified the warnings given to people prescribed hydrocodone include “don’t drive . . . anything that could be considered potentially dangerous because it can make you sleepy, drowsy, weak.” (RP 598-599, 663, 666-667).

He testified:

So my custom and practice is consistent with -- with others in that we advise people that they are not allowed to drive, operate heavy machinery, climb ladders, perform any dangerous task, while taking the medication or so that it’s been at least four hours, four to five hours, since the last time they took the medication.

(RP 690).

Dr. Hagerty testified in a toxicology screen, his understanding is that fentanyl would not give the same result as hydrocodone would. (RP 603, 621).

On cross-examination, Dr. Hagerty was asked “[d]id you think my client was impaired at the time you first saw her after the heart flight - - by drugs[,]” and he testified “[s]he was altered. Clinically, I did not when I first saw her have the ability to distinguish whether it was medications or trauma.” (RP 636).

On cross-examination, defense counsel asked Dr. Hagerty if he saw any evidence was intravenous drug use on Ms. Clemmer's arms, and Dr. Hagerty had no recollection of noticing any. (RP 647, 649-650).

Forensic scientist Kelly Daniel, testified regarding the results from her tests of the blood taken from Ms. Clemmer upon her arrival at Sacred Heart Hospital. (RP 709-762). Ms. Daniel testified the typical therapeutic range of hydrocodone is "approximately 0.01 to 0.05 mg. per liter." (RP 730, 752-753). She testified "if someone was given a larger dose they would have a larger therapeutic range than someone on a smaller dose." (RP 753). She testified Ms. Clemmer's blood result is "higher than what is reported as being a typical therapeutic range." (RP 754).

Ms. Daniel testified neither fentanyl nor hydromorphone would show up the same in her instrument as hydrocodone. (RP 730-731). Ms. Daniel testified hydrocodone is in a class of opiates, and testified as follows regarding a person exhibiting the effects of an opiate:

So opiates are a narcotic analgesic. So what you might see physically is going to be droopy eyes, maybe a low, raspy voice, small constricted pupils that might not react to light. Behaviorally they might be very drowsy, they're going to - - might be confused, uncoordinated, and have a slow reaction time.

(RP 732).

Ms. Clemmer testified in her own defense. (RP 768-797). She testified she is 43 years old. (RP 768). She testified that on July 20, 2018, she drove from

her home in Inchelium to Spokane, to visit her mother. (RP 769-770). She estimated she left home around 11:15-11:45 a.m., and testified she took her prescribed medication, 7.5 mg. of hydrocodone, before she left home. (RP 770-771, 790-791). Ms. Clemmer testified she did not bring any of her medication with her when she left home. (RP 771). She testified she is prescribed hydrocodone for pain associated with her pancreas. (RP 772). She testified she did not consume any alcohol or marijuana that day. (RP 772, 795).

Ms. Clemmer testified she decided to drive home sometime in the afternoon. (RP 773-774). She testified she stopped at Zips to purchase some food. (RP 774-775). Ms. Clemmer testified she cannot remember anything after Deer Park, including being stopped in the lane of travel, the collision, the helicopter transport, or anything she said to Trooper Field, Detective Rippee and Trooper Senger. (RP 775-776, 787, 793, 796-797). Ms. Clemmer testified the last things she remembers is feeling drowsy. (RP 783, 786, 795). She testified she remembers waking up in the hospital and being in pain. (RP 775).

Ms. Clemmer testified she has been diagnosed with diabetes. (RP 779). She testified she has had episodes of high blood sugar. (RP 781; Pl.'s Ex. 73). She testified as follows:

[Defense counsel:] The last two years, would it be fair to say you've been struggling with your blood sugar level only for the last two years?

[Ms. Clemmer:] I think I've been struggling for longer but I didn't realize that's what it was.

....

[Defense counsel:] Okay. Have you ever had - - either a psychological attack, emotional attack or a physical blood sugar attack where you have reacted in a strange way.

[Ms. Clemmer:] With my blood sugar, yes. Not emotionally, I don't believe.

....

[Defense counsel:] Do you remember an attack coming on on July 20th, 2018 when you were driving the motor vehicle?

[Ms. Clemmer:] I remember getting sleepy. . . remember like kind of hitting my face - - was getting sleepy and feeling tired. That's all I can remember.

....

I remember that and then kind of going through Deer Park and that's the last thing that I remember.

(RP 782-783).

Ms. Clemmer testified "I've never had anything like this occur ever before." (RP 784).

Ms. Clemmer testified "I've been prescribed pain medication for a long time because I have pancreatitis." (RP 788-790). When asked "[d]o you think this accident was the result of having hydrocodone in your system[,]" she testified "I've been taking hydrocodone prescribed for a while, a long while, and I've never, ever had that kind of experience before. Never." (RP 785). Ms. Clemmer testified she would have had hydrocodone in her system, but "I don't think that it was a level that would have affected me that way." (RP 791-792). She testified she does not believe the hydrocodone was affecting her driving. (RP 792).

Ms. Clemmer testified she has not necessarily experienced sleepiness with hydrocodone. (RP 791). She testified she was not taking more than the prescribed doses of hydrocodone. (RP 790). She acknowledged that several

years ago, she had a problem with taking more than the prescribed amount of prescription medication, but she does not have a problem with it now. (RP 792-793). Ms. Clemmer testified she has never been an intravenous drug user. (RP 777, 788).

The jury was instructed that in order to convict, it had to find the following elements beyond a reasonable doubt:

1. That on or about July 20, 2018, the defendant drove a motor vehicle;
2. That the defendant's driving proximately caused injury to another person;
3. That at the time of causing the injury, the defendant was driving the motor vehicle
 - a. While under the influence of any drug; or
 - b. In a reckless manner;
4. That the injured person died within three years as a proximate result of the injuries; and
5. That the defendant's act occurred in the State of Washington.

(CP 337; RP 812-813).

The jury was instructed that “[t]o return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a) or (3)(b) has been proven beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.” (CP 337; RP 813).

The jury was instructed that “[a] person is under the influence or affected by the use of any drug when the person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of any drug.” (CP 341; RP 814).

In its closing argument, the State argued there were inconsistencies within Ms. Clemmer's testimony, including:

She's inconsistent with her statements to Det. Rippee. First she didn't know the dose then. Then she told him it was 10 mg. twice a day. Now she's telling you it's 7.5 mg. "But I don't know how often." But again she's sure she follows these prescriptions to a tee.

(RP 835-837).

In defense closing argument, defense counsel argued regarding Trooper Senger's testimony that Ms. Clemmer "had track marks which were indicative of intravenous drug use." (RP 851-852). Defense counsel argued this evidence was presented in order to put Ms. Clemmer "in a bad light, - - which you might be more like [sic] to convict." (RP 852).

In its rebuttal closing argument, the State argued Ms. Clemmer "knows she was driving under the influence. She couldn't even tell you she wasn't." (RP 862). The State further argued:

I submit to you that her driving was because she was high out of her mind. Blood test shows the drugs in her system. She didn't even tell you it was an accident.

(RP 862).

Defense counsel did not object to these arguments. (RP 862).

The jury found Ms. Clemmer guilty as charged. (CP 351; RP 868-870).

At sentencing, the trial court found that a chemical dependency contributed to the offense, and "direct[ed] that there be chemical dependency

assessment and recommended treatment as part of the community custody.” (CP 374, 378; RP 902). The trial court imposed a term of community custody with conditions, including:

[P]ay supervision fees as determined by DOC [Department of Corrections];

.....

drug/alcohol evaluation and comply with any treatment recommendations;

.....

do not associate with known abusers of illegal drugs; do not use alcohol nor possess alcohol containers.

(CP 377-378; RP 902-903).

The Judgment and Sentence includes the following notation:

5.8 [✓] Department of Licensing Notice – Defendant under age 21 only.

Count _____ is (a) a violation of RCW chapter 69.41 [Legend drug], 69.50 [VUCSA], or 69.52 [Imitation drugs], and the defendant was under 21 years of age at the time of the offense **OR** (b) a violation under RCW 9.41.040 [unlawful possession of firearm], and the defendant was under the age of 18 at the time of the offense **OR** (c) a violation under RCW chapter 66.44 [Alcohol], and the defendant was under the age of 18 at the time of the offense, **AND** the court finds that the defendant previously committed an offense while armed with a firearm, an unlawful possession of a firearm offense, or an offense in violation of chapter 66.44, 69.41, 69.50, or 69.52 RCW.

Clerk’s Action –The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant’s driver’s license. RCW 46.20.265

(CP 383).

Ms. Clemmer appealed. (CP 407). An order of indigency was entered for purposes of appeal. (CP 400-406).

E. ARGUMENT

Issue 1: Whether the trial court erred in admitting Ms. Clemmer’s statements to Detective Rippee at trial, and the error was not harmless beyond a reasonable doubt.

The trial court erred in admitting the statements Ms. Clemmer made to Detective Rippee at trial. Ms. Clemmer made an unequivocal request for counsel to Trooper Senger, and she was subsequently interrogated by Detective Rippee, at his request, without having access to counsel. This error was not harmless beyond a reasonable doubt. Ms. Clemmer’s conviction should be reversed and remanded for a new trial.

“The Fifth Amendment to the United States Constitution protects a defendant against self-incrimination.” *State v. Horton*, 195 Wn. App. 202, 214, 380 P.3d 608 (2016). “Article I, section 9, of the Washington Constitution states, ‘No person shall be compelled in any criminal case to give evidence against himself.’” *Id.* “[T]he right to *Miranda* warnings arises from the right not to incriminate oneself.” *State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008); *see also Miranda v. Arizona*, 384 U.S. 436, 461, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). “‘Without *Miranda* warnings, a suspect’s statements during custodial interrogation are presumed involuntary.’” *Horton*, 195 Wn. App. at 214 (quoting *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004)).

Miranda rights may be waived. *Radcliffe*, 164 Wn.2d at 905. “The government bears the burden of showing, by a preponderance, that the suspect

understood his rights and voluntarily waived them.” *Id.* at 905-06 (citing *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)).

Once *Miranda* rights are waived, a suspect may ask for an attorney at any time. *Id.* at 906. “The suspect’s request for an attorney must be unequivocal; an equivocal request is insufficient.” *Horton*, 195 Wn. App. at 215 (citing *Radcliffe*, 164 Wn.2d at 906-07); *see also Davis v. U.S.*, 512 U.S. 452, 456-62, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). The suspect “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Davis*, 512 U.S. at 459.

In *Davis*, the Supreme Court held that the suspect’s statement, “maybe I should talk to a lawyer” was not a request for counsel, that required questioning to stop. *Davis*, 512 U.S. at 456-62.

In *Radcliffe*, our Supreme Court held the suspect’s statement “maybe I should contact an attorney” was equivocal, and therefore, upheld the admission of the suspect’s confession. *Radcliffe*, 164 Wn.2d at 907-08 (citing *Davis*, 512 U.S. at 455).

In *State v. Nysta*, the appellate court found the statement “I gotta talk to my lawyer” was an unequivocal request for an attorney. *State v. Nysta*, 168 Wn. App. 30, 40-42, 275 P.3d 1162 (2012). The court reasoned that the defendant did

not say “maybe” or “perhaps,” and “did not use conditional or obfuscating words such as ‘if’ and ‘or.’” *Id.* at 42. The court reasoned that “‘I gotta talk to my lawyer’ is plain language.” *Id.*

In *State v. Pierce*, the appellate court found the statement “[i]f you’re . . . trying to say I’m doing [sic] it I need a lawyer. I’m gonna need a lawyer because it wasn’t me []” was an unequivocal request for an attorney. *State v. Pierce*, 169 Wn. App. 533, 544-47, 280 P.3d 1158 (2012). The court noted that cases from other jurisdictions have held the statement “[c]an I talk to a lawyer? I think maybe you’re looking at me as a suspect, and *I should talk to a lawyer*. Are you looking at me as a suspect?” was an unequivocal request for an attorney. *Id.* at 546-47 (emphasis added).

In *State v. Gasteazoro-Paniagua*, the appellate court found the statement “I mean I guess I’ll just have to talk to a lawyer about it and, you know, I’ll mention that you guys are down here with a story[,]” was not an unequivocal request for an attorney. *State v. Gasteazoro-Paniagua*, 173 Wn. App. 751, 756-60, 294 P.3d 857 (2013). The court reasoned that the word “guess” indicates doubt, and “[a]n indication of doubt cannot be considered an unequivocal request.” *Id.* at 756.

If a suspect requests an attorney, “all questioning must stop until he has an attorney or starts talking again on his own.” *Radcliffe*, 164 Wn.2d at 906 (citing *Edwards*, 451 U.S. at 484-85).

In *Edwards*, the defendant was questioned by a police officer, after he was read his *Miranda* rights and agreed to speak to the officer. *Edwards*, 451 U.S. at 478-79. During the interrogation, the defendant sought to “make a deal.” *Id.* at 479. The defendant said “I want an attorney before making a deal.” *Id.* The officer stopped questioning the defendant, and he was taken to jail. *Id.*

The next day, two detectives came to the jail to speak to the defendant, and informed him of his *Miranda* rights. *Id.* The defendant was willing to talk, and eventually implicated himself in the crime. *Id.*

The Supreme Court held the defendant’s statements made on the second day were inadmissible. *Id.* at 481-87. The Court held:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as [the defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85.

The Court reasoned that although the officer stopped questioning the defendant after he requested counsel, “[i]t is also clear that without making counsel available to [the defendant], the police returned to him the next day . . . not at his suggestion or request.” *Id.* at 486-487. The Court found that the defendant was subject to custodial interrogation on the second day, at the instance of the

authorities, without having had access to counsel, which “did not amount to a valid waiver and hence was inadmissible.” *Id.* at 487.

A trial court’s findings of facts from a CrR 3.5 hearing are reviewed to determine if they are supported by substantial evidence. *Gasteazoro-Paniagua*, 173 Wn. App. at 755 (citing *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997)). Whether the trial court’s conclusions of law are properly derived from its findings of fact is reviewed de novo. *Id.*

Here, Trooper Senger advised Ms. Clemmer of her *Miranda* rights. (RP 34-35). However, after stating she understood, when Trooper Senger asked her if she would talk to him, Ms. Clemmer “asked about speaking to an attorney and said that *she should speak with one first.*” (RP 34-35) (emphasis added).

The trial court erred in entering the finding of fact that “[Ms. Clemmer] made only an ambiguous request for an attorney.” (CP 217). Substantial evidence does not support this finding. *See Gasteazoro-Paniagua*, 173 Wn. App. at 755. By stating she should speak to an attorney, Ms. Clemmer made an unequivocal request for an attorney. She clearly articulated her desire to have counsel present. *See Davis*, 512 U.S. at 459. She did not use words such as “maybe” or “perhaps,” or conditional words, such as if and or. *See Nysta*, 168 Wn. App. at 42; *cf. Davis*, 512 U.S. at 456-62; *Radcliffe*, 164 Wn.2d at 907-08. She did not use words that indicated doubt, or phrase her statement as a question. *See Gasteazoro-Paniagua*, 173 Wn. App. at 756; *cf. State v. Houghton*, No.

6785606-I, 2013 WL 1738233, *3 (Wash. Ct. App. Apr. 22, 2013) (finding the question “[s]hould I call a lawyer?” was equivocal and did not invoke the right to counsel); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

Ms. Clemmer’s request for an attorney was akin to the unequivocal requests made in *Nysta* and *Pierce*. *See Nysta*, 168 Wn. App. at 40-42; *Pierce*, 169 Wn. App. at 544-47.

After Ms. Clemmer made an unequivocal request for counsel to Trooper Senger, all questioning should have stopped until she had an attorney, or she herself initiated further conversations with the police. *See Radcliffe*, 164 Wn.2d at 906 (citing *Edwards*, 451 U.S. at 484-85). However, subsequent to her request for counsel, Detective Rippee sought out Ms. Clemmer, and read her the *Miranda* warnings, which she waived. (RP 39-42). As the Supreme Court held in *Edwards*, there was not a valid waiver of counsel by Ms. Clemmer, where she made an unequivocal request for an attorney, and was subsequently subject to custodial interrogation instigated by Detective Rippee, without having access to counsel. *See Edwards*, 451 U.S. at 484-87. Once Ms. Clemmer requested an attorney, she is not subject to further interrogation by the authorities until counsel has been made available to her, or she herself initiates further conversations with the police. *See Edwards*, 451 U.S. at 484-85. Accordingly, the trial court erred in admitting, at trial, the statements Ms. Clemmer made to Detective Rippee.

This error only requires reversal if it is prejudicial. *Nysta*, 168 Wn. App. at 43. “Harmless error analysis applies to erroneous admissions of statements obtained in violation of *Miranda*.” *Id.* The constitutional harmless error standard applies. *Id.* “Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless.” *Id.* (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *Id.* (citing *Guloy*, 104 Wn.2d at 425). “[T]he appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *Guloy*, 104 Wn.2d at 426.

Here, where the jury was instructed it did not need to be unanimous as to whether Ms. Clemmer was driving a motor vehicle while under the influence of any drug, or in a reckless manner, sufficient evidence must support each of these alternative means. (CP 337; RP 812-813); *see State v. Randhawa*, 133 Wn.2d 67, 73-74, 941 P.2d 661 (1997).

Setting aside the tainted evidence of Ms. Clemmer’s statements to Trooper Rippee, the untainted evidence regarding whether Ms. Clemmer drove while under the influence of any drug is not overwhelming. *See Guloy*, 104 Wn.2d at 426. Ms. Clemmer’s statements to Detective Rippee were crucial evidence for the jury to determine she was under the influence of hydrocodone. (RP 320-322).

The State relied upon Ms. Clemmer's statements to Detective Rippee in its closing argument, to discredit her testimony. (RP 835-837).

Detective Rippee testified Ms. Clemmer told him she took 10 mg. of hydrocodone at 11:00 and 3:00 the day of the accident. (RP 321). Although other evidence showed Ms. Clemmer had hydrocodone in her blood, there was no other evidence that she had taken hydrocodone at 3:00, close in time to her driving. (RP 725, 749, 751-752; Pl.'s Ex. 43). Ms. Clemmer testified she had not taken hydrocodone since she left her home that morning. (RP 770-771, 790-791). Further, Ms. Clemmer was administered drugs at the hospital prior to her evaluation with Trooper Senger, from which he opined she was impaired. (RP 409-411, 426, 432, 446, 593-594, 600, 608, 612, 671; Pl.'s Ex. 39). The lay testimony from witnesses who observed Ms. Clemmer on the roadway did not prove that her behavior was because she was under the influence of hydrocodone. (RP 384-385, 388, 486).

The error in admitting Ms. Clemmer's statements to Detective Rippee is not harmless beyond a reasonable doubt. Ms. Clemmer's conviction should be reversed and remanded for a new trial.

Issue 2: Whether Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of

counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a)(3). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that ““counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”” *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S. at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

a. Whether Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to improper opinion testimony by Trooper Senger concerning impairment.

Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to improper opinion testimony by Trooper Senger concerning impairment.

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ER 702. “Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” ER 704. However, allowing an otherwise inadmissible opinion that embraces an ultimate issue of fact may be reversible error. *State v. Quaale*, 182 Wn.2d 191, 199-200, 340 P.3d 213 (2014).

“The DRE officer, properly qualified, may express an opinion that a suspect’s behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs.” *State v. Baity*, 140 Wn.2d 1, 17-18, 991 P.2d 1151 (2000). “Moreover, an officer may not testify in a fashion that casts an aura of scientific certainty to the testimony.” *Id.* at 17. “An officer also may not predict the specific level of drugs present in a suspect.” *Id.*

In *Quaale*, our Supreme Court held that trial testimony by the arresting trooper in a driving under the influence trial that he had “no doubt” that the defendant was impaired based on a horizontal gaze nystagmus test was an improper opinion on guilt. *Quaale*, 182 Wn.2d at 193-194, 196-201. The Court found the trooper’s testimony was inadmissible under *Baity*. *Id.* at 198-99. The Court reasoned the testimony was improper for two reasons:

First, the trooper cast his testimony in a way that gave it an aura of scientific certainty. By testifying that he had “no doubt,” the trooper implied that the HGN test may reveal that someone is intoxicated and “impaired” on alcohol when the test simply shows physical signs consistent with alcohol consumption. Although an officer may testify that the test revealed signs consistent with alcohol consumption, the officer here cast his conclusion in absolute terms and improperly gave the appearance that the HGN test may produce scientifically certain results.

Second, the trooper testified to a specific level of intoxication when he testified that the defendant was “impaired.”

....

[T]he conclusion that the defendant was impaired rests on the premise that the defendant consumed a sufficient level of intoxicants to be impaired. Even though the testimony did not include a numerical blood alcohol level, the testimony implicitly includes a specific level of intoxication; that the alcohol consumed impaired the defendant, which is the legal standard for guilt.

Id. at 199-200.

The Court then found the officer’s testimony was an improper opinion on guilt. *Id.* at 199. The Court reasoned “[t]he case before us presents an improper opinion on guilt by inference because the trooper’s opinion went to the core issue and the only disputed element: whether [the defendant] drove while under the influence of alcohol.” *Id.* at 200. The Court reasoned “[t]he trooper’s testimony

that [the defendant] was ‘impaired’ parroted the legal standard contained in the jury instruction definition for ‘under the influence.’” *Id.* The Court further reasoned “[b]ecause the trooper’s inadmissible testimony went to the ultimate factual issue – the core issue of [the defendant’s] impairment to drive – the testimony amounted to an improper opinion on guilt.” *Id.*

Here, Trooper Senger testified that “[b]ased on everything I made a determination that [Ms. Clemmer] was impaired.” (RP 410-411). He testified that it was his conclusion that she was impaired, and this was not due to anything Ms. Clemmer was given at the hospital. (RP 446). Defense counsel did not object to this testimony. (RP 410-411, 446).

Defense counsel’s failure to object to this evidence was deficient performance. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). Had defense counsel objected to Trooper Senger’s testimony as improper opinion testimony, the objection would have been granted. *See Baity*, 140 Wn.2d at 17-18; *Quaale*, 182 Wn.2d at 193-194, 196-201. Trooper Senger did not merely testify Ms. Clemmer had physical signs consistent with drug consumption. Instead, he testified Ms. Clemmer was impaired, which went to the ultimate factual issue at trial, Ms. Clemmer’s impairment to drive. *See Quaale*, 182 Wn.2d at 200; *cf. State v. Hunter*, No. 49052-8-II, 2017 WL 6337460, *2-3 (Wash. Ct. App. Dec. 12, 2017) (rejecting an argument that an officer’s testimony was an improper opinion on guilt; the officer testified the defendant was

intoxicated rather than impaired); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

Trooper Senger's testimony that Ms. Clemmer was impaired parroted the legal standard contained in the jury instruction for under the influence. *See Quaale*, 182 Wn.2d at 200; *see also* CP 341; RP 814. Trooper Senger cast his testimony in a way that gave it "an aura of scientific certainty[.]" and his testimony that Ms. Clemmer was impaired implicitly included a specific level of drugs present in her system. *See Quaale*, 182 Wn.2d at 199-200. Trooper Senger's testimony that Ms. Clemmer was impaired was an improper opinion on guilt.

Defense counsel's deficient performance prejudiced Ms. Clemmer. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that absent this error the results of the trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26).

Trooper Senger's testimony that Ms. Clemmer was impaired, not due to anything she'd been given at the hospital, most likely persuaded the jury to find that she was under the influence of hydrocodone while she was driving. (CP 341; RP 410-411, 446, 814). The evidence that Ms. Clemmer drove while under the influence of any drug is not overwhelming. Although evidence showed Ms. Clemmer had hydrocodone in her blood, it was only slightly higher than the

typical therapeutic range. (RP 725, 730, 749, 751-753; Pl.'s Ex. 43). Further, Ms. Daniel testified "if someone was given a larger dose they would have a larger therapeutic range than someone on a smaller dose." (RP 753). Ms. Clemmer testified she had not taken hydrocodone since she left her home that morning. (RP 770-771, 790-791). The lay testimony from witnesses who observed Ms. Clemmer on the roadway did not prove that her behavior was because she was under the influence of hydrocodone. (RP 384-385, 388, 486).

Moreover, defense counsel did not make a tactical decision by failing to object to Trooper Senger's testimony as improper opinion testimony. *See Grier*, 171 Wn.2d at 33. This testimony addressed the ultimate factual issue at trial, Ms. Clemmer's impairment to drive. There was no tactical reason for failing to object to this evidence.

Ms. Clemmer has met the two-prong test for ineffective assistance of counsel. Defense counsel's failure to object Trooper Senger's testimony as improper opinion testimony, constituted deficient performance and Ms. Clemmer was prejudiced by that deficient performance. Her conviction should be reversed and remanded for a new trial.

b. Whether Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to the admission of evidence regarding intravenous drug use on evidentiary grounds.

Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to the admission of

evidence regarding intravenous drug use, by Trooper Senger and Ms. Galloway, on evidentiary grounds.

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show “that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]” and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007).

Here, Trooper Senger testified that Ms. Clemmer had markings consistent with intravenous drug use. (RP 419-420). He also testified that intravenous drug use can make it more difficult to draw blood, after testifying the legal blood draw on Ms. Clemmer took four attempts to complete. (RP 411-420, 445). Ms. Galloway testified she noticed markings on Ms. Clemmer “that could possibly be IV drug user marks[,] and that this makes it more difficult to draw blood. (RP 452). Defense counsel did not object. (RP 411-420, 452).

An objection to this evidence based on relevancy would have been sustained. *See Sexsmith*, 138 Wn. App. at 509. The evidence was not relevant because the State alleged Ms. Clemmer was under the influence of hydrocodone, which is only delivered to the body orally, not intravenously. (RP 659); *see also* ER 401 (defining relevant evidence as “evidence having 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.”). The State did not allege Ms. Clemmer drove under the influence of any intravenous drugs.

Furthermore, the evidence would have been excluded because “its probative value is substantially outweighed by the danger of unfair prejudice. . . .” ER 403. The evidence was highly prejudicial, because it implied the Ms. Clemmer was an active intravenous drug user, portraying her in a negative light, and as more likely to have committed the crime alleged. Where the State was not alleging Ms. Clemmer drove under the influence of intravenous drugs, this evidence had no probative value, but instead a danger of unfair prejudice, using this allegation to portray Ms. Clemmer as a drug addict who must have driven under the influence on the date in question.

In addition to failing to object, defense counsel’s performance was deficient for questioning both Trooper Senger and Ms. Galloway, on cross-examination, regarding the intravenous drug use markings. (RP 426-427, 458-459). Defense counsel also brought up the testimony in closing argument, drawing more attention to it. (RP 851-852). Rather than cross-examine witnesses and argue in closing regarding this irrelevant evidence, defense counsel should have objected to its admission in the first instance. *See Sexsmith*, 138 Wn. App. at 509; *see also* ER 401, 403.

Defense counsel's deficient performance prejudiced Ms. Clemmer. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that absent this error the results of the trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26); *see also Sexsmith*, 138 Wn. App. at 509.

Sufficient evidence must support each of the alternative means, that Ms. Clemmer was driving a motor vehicle while under the influence of any drug, or in a reckless manner. (CP 337; RP 812-813); *see Randhawa*, 133 Wn.2d at 73-74. The evidence that Ms. Clemmer drove while under the influence of any drug is not overwhelming. Although evidence showed Ms. Clemmer had hydrocodone in her blood, it was only slightly higher than the typical therapeutic range. (RP 725, 730, 749, 751-753; Pl.'s Ex. 43). Further, Ms. Daniel testified "if someone was given a larger dose they would have a larger therapeutic range than someone on a smaller dose." (RP 753). Ms. Clemmer testified she had not taken hydrocodone since she left her home that morning. (RP 770-771, 790-791). Further, Ms. Clemmer was administered drugs at the hospital prior to her evaluation with Trooper Senger, from which he opined she was impaired. (RP 409-411, 426, 432, 446, 593-594, 600, 608, 612, 671; Pl.'s Ex. 39). The lay testimony from witnesses who observed Ms. Clemmer on the roadway did not prove that her behavior was because she was under the influence of hydrocodone. (RP 384-385, 388, 486).

Moreover, defense counsel did not make a tactical decision by failing to object to the admission of evidence regarding intravenous drug use. *See Grier*, 171 Wn.2d at 33; *Sexsmith*, 138 Wn. App. at 509. Defense counsel made successful motions in limine to exclude other evidence of drug use by Ms. Clemmer, with the trial court ruling that medical records of Ms. Clemmer's past cocaine use and treatment were "prejudicial, - - not really probative of very much." (RP 64-66). This shows defense counsel was aware of the prejudicial nature of evidence related to drug use by Ms. Clemmer. In addition, defense counsel asked Dr. Hagerty and Ms. Clemmer about intravenous drug use, attempting to discredit the evidence. (RP 647, 649-650, 777, 788). Defense counsel also brought up the evidence in closing argument. (RP 851-852). Defense counsel's efforts to discredit the evidence show that his failure to object was not tactical, but instead, deficient performance.

Ms. Clemmer has met the two-prong test for ineffective assistance of counsel. Defense counsel's failure to object to the admission of evidence regarding intravenous drug use, by Trooper Senger and Ms. Galloway, constituted deficient performance and Ms. Clemmer was prejudiced by that deficient performance. Her conviction should be reversed and remanded for a new trial.

Issue 3: Whether the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by shifting the burden of proof to Ms. Clemmer.

In its rebuttal closing argument, the State committed misconduct by shifting the burden of proof to Ms. Clemmer. The misconduct was prejudicial and incurable, and therefore, requires a new trial.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgeron*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant “must first show that the prosecutor's statements are improper.”).

If the defendant fails to properly object to the misconduct, “a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.” *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct

resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455).

“Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762.

“A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt.” *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). “A prosecutor generally cannot comment on the defendant's failure to present evidence because the defendant has no duty to present evidence.” *Thorgerson*, 172 Wn.2d at 453.

Accordingly, a prosecutor commits misconduct by making arguments designed to shift the burden of proof onto the accused to “disprove the state's case.” *Fleming*, 83 Wn. App. at 214.

“A prosecutor may commit misconduct by mentioning during closing argument that the defense failed to present witnesses or by stating that the jury should find the defendant guilty based simply on the defendant's failure to present evidence to support his defense theory.” *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952, 958 (2012) (citing *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553 (2009)). But, “[t]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.” *Id.* (quoting *Jackson*, 150 Wn. App. at 885-886). “It is not misconduct

. . . for a prosecutor to argue that the evidence does not support the defense theory.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747, 786 (1994).

Here, the State did not merely argue the evidence presented at trial does not support the defense theory of the case. Instead, the State impermissibly commented on Ms. Clemmer’s failure to present evidence. *See Thorgerson*, 172 Wn.2d at 453; *see also Sells*, 166 Wash. App. at 930 (citing *Jackson*, 150 Wn. App. at 885). In its rebuttal closing argument, the State argued Ms. Clemmer “knows she was driving under the influence. *She couldn’t even tell you she wasn’t.*” (RP 862) (emphasis added). The State further argued “I submit to you that her driving was because she was high out of her mind. Blood test shows the drugs in her system. *She didn’t even tell you it was an accident.*” (RP 862) (emphasis added). Defense counsel did not object to this argument. (RP 862).

The State impermissibly commented on Ms. Clemmer’s failure to present evidence to support her theory that she was not under the influence of hydrocodone while driving on the day in question. *See Thorgerson*, 172 Wn.2d at 453; *see also Sells*, 166 Wash. App. at 930 (citing *Jackson*, 150 Wn. App. at 885). The State impermissibly shifted the burden of proof to Ms. Clemmer to disprove that she was driving under the influence of hydrocodone.

In *State v. French*, the State argued in closing, “the defense has given you absolutely no reason to be able to conclude the defendant didn’t do this.”

State v. French, 101 Wn. App. 380, 383, 386, 4 P.3d 857 (2000). The court held this comment improperly suggested the defendant had a duty to present evidence. *Id.* at 386.

Similarly, here, the prosecutor argued that the jury should convict Ms. Clemmer because she did not prove that she was not driving under the influence, or that the collision was an accident, to support her theory that she was not driving under the influence of hydrocodone that day. (RP 862). The State improperly shifted the burden of proof to Ms. Clemmer. The prosecutor's argument was improper.

The State's argument prejudiced Ms. Clemmer. *See Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). The evidence that Ms. Clemmer drove while under the influence of any drug is not overwhelming. Although evidence showed Ms. Clemmer had hydrocodone in her blood, it was only slightly higher than the typical therapeutic range. (RP 725, 730, 749, 751-753; Pl.'s Ex. 43). Further, Ms. Daniel testified "if someone was given a larger dose they would have a larger therapeutic range than someone on a smaller dose." (RP 753). Ms. Clemmer testified she had not taken hydrocodone since she left her home that morning. (RP 770-771, 790-791). Further, Ms. Clemmer was administered drugs at the hospital prior to her evaluation with Trooper Senger, from which he opined she was impaired. (RP 409-411, 426, 432, 446, 593-594, 600, 608, 612, 671; Pl.'s Ex. 39). The lay testimony from witnesses who observed Ms. Clemmer on the

roadway did not prove that her behavior was because she was under the influence of hydrocodone. (RP 384-385, 388, 486). Therefore, the prosecutor's comments had a substantial likelihood of affecting the jury verdict.

The State's misconduct "was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered." *O'Donnell*, 142 Wn. App. at 328 (quoting *Munguia*, 107 Wn. App. at 336); see also *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). No curative instruction would have alleviated the belief in the jurors' minds that Ms. Clemmer was required to disprove that she was driving under the influence of hydrocodone. The error was incurable, given the fact that the case hinged upon whether the jury believed Ms. Clemmer was driving under the influence of hydrocodone.

The State committed misconduct in its closing arguments that was prejudicial and incurable, by shifting the burden of proof to Ms. Clemmer. This Court should reverse her conviction and remand for a new trial.

Issue 4: Whether cumulative error requires reversal for a new trial where the admission of Ms. Clemmer's statements to Detective Rippee, the denial of her Sixth Amendment right to effective assistance of counsel, and the State's misconduct did not afford Ms. Clemmer a fair trial.

Even if this Court could determine that one or more of the errors are not prejudicial enough to warrant reversal, the cumulative effect of the prejudicial errors in this case warrants reversal: the admission of Ms. Clemmer's statements to Detective Rippee; the denial of her Sixth Amendment right to effective

assistance of counsel; and the State's misconduct. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (noting that several trial errors "standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial").

"It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless." *State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999); *see also In re Pers. Restraint of Yates*, 177 Wn.2d 1, 65-66, 296 P.3d 872 (2013). Constitutional error requires reversal unless the court is certain beyond a reasonable doubt a jury would have reached the same conclusion in absence of the error. *Id.* at 857. "Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial." *Id.*

The trial court erred in admitting Ms. Clemmer's statements to Detective Rippee at trial, because these statements were made after she made an unequivocal request for an attorney. Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to improper opinion testimony by Trooper Senger concerning impairment, and when her attorney failed to object to the admission of evidence regarding intravenous drug use on evidentiary grounds. The State committed misconduct its

rebuttal closing argument by shifting the burden of proof to Ms. Clemmer, to disprove that she was driving under the influence of hydrocodone.

The cumulative effect of these errors was harmful given they all affected whether Ms. Clemmer was driving under the influence of hydrocodone, the primary issue for the jury to determine at trial. These errors individually and as a whole materially affected the outcome of the trial. Cumulative error denied Ms. Clemmer a fair trial, and her conviction should be reversed and remanded for a new trial.

Issue 5: Whether the trial court erred by imposing four unauthorized community custody conditions.

The trial court erred in imposing the following conditions of community custody: (1) requiring Ms. Clemmer to pay supervision fees as determined by DOC; (2) requiring Ms. Clemmer to obtain an alcohol evaluation and comply with any treatment recommendations; (3) prohibiting Ms. Clemmer from associating with known abusers of illegal drugs; and (4) prohibiting Ms. Clemmer from possessing alcohol containers. (CP 377-378; RP 902-903). These conditions should be stricken from her judgment and sentence.

Ms. Clemmer challenges these community custody conditions for the first time on appeal. (RP 902-903). Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that

illegal or erroneous sentences may be challenged for the first time on appeal.”)
(quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

This Court has found it has discretion to decline to review certain objections to community custody conditions raised for the first time on appeal. *State v. Peters*, 10 Wn. App. 2d 574, 580-83, 591, 455 P.3d 141 (2019); *State v. Casimiro*, 8 Wn. App. 2d 245, 249, 438 P.3d 137, review denied, 193 Wn.2d 1029 (2019). In *Peters*, the Court stated “for an objection to a community custody condition to be entitled to review for the first time on appeal, it must (1) be manifest constitutional error or a sentencing condition that, as *Blazina*² explains, is ‘illegal or erroneous’ as a matter of law, and (2) it must be ripe.” *Peters*, 10 Wn. App. 2d at 583. The Court further stated “[w]e are not required to consider an argument that a sentencing condition is not crime related when the offender had the opportunity to raise the contention in the trial court, creating a record, and failed to do so.” *Id.* at 591.

However, subsequent to *Peters*, a panel of this Court considered challenges to community custody for the first time on appeal, including considered challenges to four community custody conditions as not crime related. *State v. Alvarez*, No. 35567-5-III, 2019 WL 5566355, *8-11 (Wash. Ct. App. Jan. 23, 2020); see also GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority). Prior to considering these

² *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

challenges, the Court stated “[d]efendants may generally challenge community custody conditions that are contrary to statutory authority for the first time on appeal.” *Id.* at *8 (citing *Bahl*, 164 Wn.2d at 745).

Ms. Clemmer asks this Court to exercise its discretion and consider her challenges to her community custody conditions below, for the first time on appeal. *See Bahl*, 164 Wn.2d at 744-45; *see also Alvarez*, 2019 WL 5566355, at *8-11. As set forth below, the record contains the facts necessary to consider the challenges.

Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons[.]” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

Where the trial court lacked authority to impose a community custody condition, the appropriate remedy is to remand to strike the condition. *See, e.g., State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

a. Whether the trial court erred by requiring Ms. Clemmer to pay supervision fees as determined by DOC.

The trial court erred in imposing a condition of community custody requiring Ms. Clemmer to pay supervision fees as determined by DOC, because this fee is a discretionary legal financial obligation (LFO), and the trial court found Ms. Clemmer indigent. This condition should be stricken from the judgment and sentence.

The trial court erred in imposing a condition of community custody requiring Ms. Clemmer to pay supervision fees as determined by DOC. (CP 377). The community custody supervision fee is a discretionary LFO, because it can be waived by the sentencing court. *See State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018) (holding that costs of costs of community custody are discretionary LFOs); *see also State v. Lilly*, No. 78709-8-I, 2019 WL 6134572, *1 (Wash. Ct. App. Nov. 18, 2019) (recognizing and applying the holding from *Lundstrom*); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority); RCW 9.94A.703(2)(d) (allowing the sentencing court to impose, or to waive, a condition of community custody requiring an offender to “[p]ay supervision fees as determined by the department[.]”).

Discretionary LFOs cannot be imposed on a defendant who is indigent at the time of sentencing. *See* RCW 10.01.160(3); *see also* RCW 10.101.010(3)(a)-(c) (defining indigent). Ms. Clemmer was indigent at sentencing. (CP 400-409).

Therefore, the condition of community custody requiring Ms. Clemmer to pay supervision fees as determined by DOC should be stricken. *See State v. Taylor*, Nos. 51291-2-II, 51301-3-II, 2019 WL 2599184, *4 (Wash. Ct. App. June 25, 2019) (holding that because the defendant was found indigent at sentencing, the community custody supervision fee must be stricken under RCW 10.01.160(3)); *see also State v. Reamer*, Nos. 78447-1-I, 78506-1-I, 2019 WL 3416868, *5 (Wash. Ct. App. July 29, 2019) (directing the trial court to strike this condition on remand); *State v. Redmann*, No. 36689-9-III, 2020 WL 242490, *1-2 (Wash. Ct. App. Jan. 16, 2020) (considering the issue of whether the trial court erred in imposing community custody supervision fees for the first time on appeal, and remanding the case for the trial court to conduct an inquiry into the defendant's financial status); *but see State v. Abarca*, No. 51673-0-II, 2019 WL 5709517, *10-11 (Wash. Ct. App. Nov. 5, 2019) (concluding that a community custody supervision assessment is discretionary, but it is not a cost requiring an inquiry into the defendant's ability to pay; nonetheless encouraging the trial court to reconsider the imposition of this assessment on remand); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

b. Whether the trial court erred by requiring Ms. Clemmer to obtain an alcohol evaluation and comply with any treatment recommendations.

The trial court erred in imposing a condition of community custody requiring Ms. Clemmer to obtain an alcohol evaluation and comply with any treatment recommendations, because there is no evidence that alcohol contributed to her crime, or that this treatment requirement is crime-related. This condition should be stricken from the judgment and sentence.

A trial court's sentencing authority is limited to that granted by statute. *Leach*, 161 Wn.2d at 184. The trial court may order an offender to do the following, as part of a term of community custody:

- (c) Participate in crime-related treatment or counseling services;
- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
- ...
- or (f) [c]omply with any crime-related prohibitions.

RCW 9.94A.703(3)(c), (d), (f). The Court of Appeals "has struck crime-related community custody conditions when there is 'no evidence' in the record that the circumstances of the crime related to the community custody condition." *State v. Irwin*, 191 Wn. App. 644, 656–57, 364 P.3d 830 (2015).

In *State v. Jones*, the court found the trial court erred by ordering the defendant to participate in alcohol counseling as a condition of community custody, because there was no evidence that alcohol contributed to his crimes or that the alcohol counseling requirement was crime-related. *State v. Jones*, 118

Wn. App. 199, 207-08, 76 P.3d 258 (2003). The court further found that “alcohol counseling ‘reasonably relates’ to the offender’s risk of reoffending and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.” *Id.* at 208.

Here, the trial court imposed a community custody condition requiring Ms. Clemmer to obtain an alcohol evaluation and comply with any treatment recommendations. (CP 378). However, there is no evidence in the record that alcohol use contributed to Ms. Clemmer’s crime of vehicular homicide, or that the requirement to obtain an alcohol evaluation and comply with any treatment recommendations was crime-related. (RP 725, 749, 751-752, 772; Pl.’s Ex. 43). The State’s theory was that Ms. Clemmer was under the influence of drugs, not alcohol. (RP 862). The State did not present evidence that Ms. Clemmer was under the influence of alcohol. Ms. Clemmer testified she did not consume any alcohol on the day of the accident. (RP 772).

The trial court erred by requiring Ms. Clemmer to obtain an alcohol evaluation and comply with any treatment recommendations, because it was not crime-related. *See Jones*, 118 Wn. App. at 207-08; *see also* RCW 9.94A.703(3)(c); *State v. Warnock*, 174 Wn. App. 608, 611-14, 299 P.3d 1173 (2013) (the trial court erred in ordering evaluation and treatment for substance abuse, where there was no evidence that anything other than alcohol contributed to the offense).

In addition, obtaining an alcohol evaluation and comply with any treatment recommendations does not “reasonably relate” to Ms. Clemmer’s risk of reoffending or the safety of the community, because there is no evidence that alcohol contributed to the offense. *Jones*, 118 Wn. App. at 208; *see also* RCW 9.94A.703(3)(d).

Therefore, the condition of community custody requiring Ms. Clemmer to obtain an alcohol evaluation and comply with any treatment recommendations should be stricken. *See O’Cain*, 144 Wn. App. at 775 (setting forth this remedy).

c. Whether the trial court erred by prohibiting Ms. Clemmer from associating with known abusers of illegal drugs.

The trial court erred in imposing a condition of community custody prohibiting Ms. Clemmer from associating with known abusers of illegal drugs, because this class of persons bears no relation to Ms. Clemmer’s crime of conviction. This condition should be stricken from the judgment and sentence.

A trial court’s sentencing authority is limited to that granted by statute. *Leach*, 161 Wn.2d at 184. The trial court may order an offender, as part of a term of community custody, to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” RCW 9.94A.703(3)(b). “The specified class must bear some relationship to the crime.” *State v. Johnson*, 184 Wn. App. 777, 781, 340 P.3d 230 (2014) (citing *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998)).

Here, the trial court imposed a community custody condition prohibiting Ms. Clemmer from associating with known abusers of illegal drugs. (CP 378). However, this class of persons bears no relationship to Ms. Clemmer's crime of conviction. The State alleged Ms. Clemmer drove a motor vehicle while under the influence of a legal prescription drug, hydrocodone. (RP 725, 749, 751-752, 862; Pl.'s Ex. 43). Ms. Clemmer testified she took hydrocodone on the day of the accident, but no other substances. (RP 770-772, 790-791, 795).

The State did not present evidence that the crime of conviction was related to illegal drug use, or those who abuse illegal drugs. Therefore, the trial court erred in imposing a condition of community custody prohibiting Ms. Clemmer from associating with known abusers of illegal drugs, because this class of persons bears no relation to Ms. Clemmer's crime of conviction. *See Johnson*, 184 Wn. App. at 781 (citing *Riles*, 135 Wn.2d at 350); *see also* RCW 9.94A.703(3)(b). The condition of community custody prohibiting Ms. Clemmer from associating with known abusers of illegal drugs should be stricken. *See O'Cain*, 144 Wn. App. at 775.

d. Whether the trial court erred by prohibiting Ms. Clemmer from possessing alcohol containers.

The trial court erred in imposing a condition of community custody prohibiting Ms. Clemmer from possessing alcohol containers, because condition is not authorized by statute, nor is it crime related. This condition should be stricken from the judgment and sentence.

A trial court's sentencing authority is limited to that granted by statute. *Leach*, 161 Wn.2d at 184. The trial court may order an offender, as part of a term of community custody, to “[r]efrain from possessing or consuming alcohol[.]” RCW 9.94A.703(3)(e).

Here, the trial court imposed a condition of community custody prohibiting Ms. Clemmer from possessing alcohol containers. (CP 378). While a prohibition on possession of alcohol is permitted by statute, a prohibition on possession of *alcohol containers* is not. *See* RCW 9.94A.703(3)(e).

Further, as acknowledged above, the trial court may order an offender to “[c]omply with any crime-related prohibitions[]” as part of a term of community custody. RCW 9.94A.703(3)(f). However, there is no evidence in the record that alcohol use contributed to Ms. Clemmer's crime of vehicular homicide. (RP 725, 749, 751-752, 772; Pl.'s Ex. 43). Therefore, the condition of community custody prohibiting Ms. Clemmer from possessing alcohol containers is not crime-related.

Because the condition of community custody prohibiting Ms. Clemmer from possessing alcohol containers is not authorized by statute, nor is it crime related, the condition should be stricken. *See O'Cain*, 144 Wn. App. at 775.

Issue 6: Whether the judgment and sentence contains an error that should be corrected: it requires notice be given to the Department of Licensing to revoke the driving privileges of a juvenile.

The judgment and sentence includes a notation requiring the Clerk of the trial court to “forward an Abstract of Court Record (ACR) to the DOL

[Department of Licensing], which must revoke the Defendant's driver's license. RCW 46.20.265." RCW 46.20.265 authorizes DOL to revoke the driving privileges of a juvenile, under specified circumstances. *See* RCW 46.20.265(1). However, on the date of the accident, Ms. Clemmer was over the age of 21 years old. (CP 372; RP 768). Because of her age, RCW 46.20.265 does not apply to Ms. Clemmer. Therefore, this court should remand this case for correction of the judgment and sentence to remove the language requiring notice be given to the Department of Licensing to revoke the driving privileges of a juvenile. *See* CrR 7.8(a) (scrivener's errors in judgments may be corrected at any time); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

F. CONCLUSION

For each of the following reasons, Ms. Clemmer's conviction should be reversed and remanded for a new trial: (1) the trial court erred in admitting Ms. Clemmer's statements to Detective Rippee at trial, and the error was not harmless beyond a reasonable doubt; (2) Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to improper opinion testimony by Trooper Senger concerning impairment; (3) Ms.

Clemmer was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to the admission of evidence regarding intravenous drug use on evidentiary grounds; and (4) the State committed misconduct its rebuttal closing argument that was prejudicial and incurable by shifting the burden of proof to Ms. Clemmer. If one of these errors on its own is not sufficient grounds for reversal, Ms. Clemmer requests this Court find that cumulative error denied her a fair trial.

The trial court also erred by imposing four unauthorized conditions of community custody: (1) requiring Ms. Clemmer to pay supervision fees as determined by DOC; (2) requiring Ms. Clemmer to obtain an alcohol evaluation and comply with any treatment recommendations; (3) prohibiting Ms. Clemmer from associating with known abusers of illegal drugs; and (4) prohibiting Ms. Clemmer from possessing alcohol containers. These conditions should be stricken.

The judgment and sentence should also be corrected to remove the language requiring notice be given to the Department of Licensing to revoke the driving privileges of a juvenile.

Respectfully submitted this 13th day of February, 2020.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

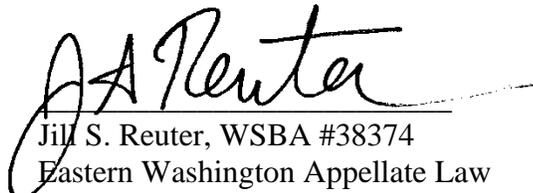
STATE OF WASHINGTON) COA No. 37133-6-III
Plaintiff/Respondent)
vs.) Stevens Co. No. 18-1-00254-5
)
REBECCA ANNE CLEMMER) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 13, 2020, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Rebecca Anne Clemmer, DOC No. 419382
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

Having obtained prior permission, I also served a copy on the Respondent at trasmussen@co.stevens.wa.us using the Washington State Appellate Courts' Portal.

Dated this 13th day of February, 2020.


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