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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

REBECCA CLEMMER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF STEVENS COUNTY

BRIEF OF RESPONDENT

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I. SUMMARY OF ARGUMENT

At least seven witnesses observed the defendant's horrific driving as she drove for miles north on Highway 395 from Spokane to just past Clayton. Many called 911 to report the driving. The defendant repeatedly crossed from the shoulder of the northbound lane to the shoulder of the oncoming southbound traffic lane, forcing traffic into the ditch. Finally, she struck the deceased's vehicle head-on as he swerved to the shoulder in an attempt to avoid the fatal accident. The hydrocodone in her system was over the typical therapeutic range and she should not have been driving while taking the opiate.

Because the testimony relating to her horrendous driving was unavoidable, as was the scientific blood evidence of opiate ingestion and the medical instructions that one should not drive while taking these types of opiates, the defendant undertook the only available defense – a that her appalling driving was worse than would be caused by simple drug ingestion; it was so bad that it must have been related to some other type of medical malady or condition. The fact that this tactic failed does not render trial counsel ineffective; facts are stubborn things.

II. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by holding the statements made to Detective Rippee were admissible at trial.
2. Ms. Clemmer was denied her Sixth Amendment right to effective assistance of counsel, when her attorney failed to object to opinion testimony by Trooper Senger concerning impairment, and failed to object to the admission of evidence regarding intravenous drug use on evidentiary grounds.
3. The State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by shifting the burden of proof to Ms. Clemmer.
4. The cumulative error requires a new trial.
5. The trial court erred by imposing 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.

6. The judgment contains a ministerial error that should be corrected: where it requires notice be given to the Department of Licensing to revoke the driving privileges of a juvenile.

III. ISSUES PRESENTED

1. Whether the trial court erred in admitting the defendant's statements to Detective Rippee at trial, and, if so, whether the error was harmless beyond a reasonable doubt?
2. Whether the defendant was denied her Sixth Amendment right to effective assistance of counsel?
3. Whether the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable?
4. Whether cumulative error requires reversal for a new trial?
5. Whether the trial court erred by imposing certain community custody conditions?
6. Whether the judgment contains a ministerial error that should be corrected because it requires notice be given to the Department of Licensing to revoke the driving privileges of a juvenile?

IV. STATEMENT OF THE CASE

On July 20, 2018, Ms. Jessie Hamblin was a passenger in a car driving north from Spokane on Highway 395. RP 367-71. She first observed the defendant's erratically driven car approximately four or five miles south

of Deer Park. RP 367, 371. The car was “crisscrossing from the right side of the highway to the left side of the highway and back to the right, back to the left, back to the right” “for miles.” RP 367. Oncoming traffic was swerving out of the way of the defendant’s car. RP 371. Ms. Hamblin observed dust flying up as the defendant’s car touched the shoulders on each side of the road. RP 368. Ms. Hamblin called 911. RP 371. As the defendant neared the town of Clayton, she stopped in the middle of Highway 395. RP 368. The driver of a following truck drove up beside her, stopped and attempted to speak with her; he then hollered at her, drove around her car, and left. RP 368-69, 372. The defendant started driving again; continuing to travel back and forth across the roadway until she struck an oncoming vehicle, killing the 22-year-old driver, Erik Bruhjell. RP 267, 369. Ms. Hamblin again called 911 before she left the collision scene. *Id.*

As Mr. Chase Birchler was driving north on Highway 395, he also observed the defendant’s erratically driven car cross the center line into oncoming traffic and then cross back to the right-hand shoulder. RP 479-81. This occurred just before Deer Park. RP 481. The defendant’s driving forced an oncoming green Dodge Ram truck into the ditch. *Id.* Mr. Birchler called 911. RP 482. At Deer Park, the defendant struck some orange road cones that were filled with water. RP 481. As the defendant neared Clayton, she stopped in the middle of the road for a few minutes. *Id.* The cars in front

of Mr. Birchler passed around her. RP 482. Mr. Birchler followed the defendant's vehicle at a great distance, so as not to be involved in any impending accident. RP 483. He witnessed an oncoming vehicle attempt to avoid colliding with the defendant's approaching car. *Id.* However, the oncoming car was struck on the driver's side quarter panel so hard that a 20-foot plume of dust shot into the air. RP 483.

Mr. Kyle Hendron also observed the collision. RP 523. He had pulled up on the shoulder beside the defendant to see if she needed help while she was parked in the middle of the road, near Clayton. RP 523. However, the defendant just took off and veered to the right and hit the shoulder, and then started weaving into the oncoming lane where she stayed for about a half-mile before "she whacked him head-on, and threw him off the side of the road." RP 523-24.

Ms. Ashley Krieger was a passenger in a vehicle travelling north to Clayton on Highway 395. RP 376. As she and her husband approached Clayton, she observed the defendant's car stopped in the middle of the highway. RP 376-77. Her husband drove up on the shoulder, up to the defendant's car and stopped right next to her vehicle. RP 377. Ms. Krieger could observe the defendant, just sitting in her car, eating what appeared to be a Zip's hamburger. RP 378-79. The defendant did not even look at the Kriegers as they stopped beside her vehicle, even though they honked their

horn in an attempt to get her attention. RP 379-81, 388. The Kriegers drove off and called 911.

On cross-examination, Ms. Krieger admitted that the defendant was not agitated or laughing, she just “seemed very out of it,” just quietly looking ahead, eating a sandwich, seemingly like she was in slow motion as she was eating. RP 383. On redirect, Ms. Krieger stated that from her perspective, she interpreted the slow eating to be due to the defendant being either “drunk or high or stoned, under the influence of something.” RP 385.

Ms. Ricarda Montague and her husband, Mr. Richard Montague, also observed the defendant parked in the middle of the road, in the lane of travel, just short of Clayton. RP 463-64. When the Montagues were about three cars back from the defendant’s parked car, she “just took off like a bat going down the road,” then momentarily pulled over onto the shoulder, before again accelerating and crashing. RP 464-65, 472-73.

On cross-examination of Ms. Montague, the defendant’s attorney attempted to establish that the defendant’s driving was extreme and severe; that her car stopped directly in the middle of a major highway, and then drove across the highway into oncoming traffic; and that it was the type of driving that you would only observe once in a life time. RP 468-70.

On cross-examination of Mr. Richard Montague, the defendant’s attorney established that the defendant’s driving was extremely unusual and

shocking, even when compared to Mr. Montague's experience as a passenger in a car where the driver was drinking and driving – driving under the influence. RP 475-76.

At 6:30 p.m., Trooper Don Field responded to the collision scene on Highway 395 in Stevens County. RP 184. The roads were bare and dry, and visibility was good. *Id.* From his observations of the fatality scene, it was clear that Ms. Clemmer's vehicle had caused the collision by crossing the center line and striking the other vehicle.¹ RP 191; Ex. 9. The other vehicle, a black Mazda 3, belonging to the deceased, Erik Bruhjell, was off the roadway in the ditch. RP 189, 215. *See* Ex. 5 (admitted at RP 186). Ms. Clemmer was still in her vehicle. Based on his observations at the scene and from information he had received from others,² Trooper Field asked Ms. Clemmer why she was driving so fast. RP 191. She responded she had been in a hurry to pick up her kids from daycare. RP 192. Some loose pills were found in her purse that were later tested and found to be a controlled substance. RP 201, 209.

WSP Sergeant Dustin Drout, with training as a collision scene investigator, examined the crash scene. He testified that the evidence

¹ Det. Rippee obtained Ms. Clemmer's car data that established she was doing 70 miles per hour from 5 seconds to half a second before the crash and that there was no braking by her vehicle before the crash. RP 332-33; Ex. 55.

² A sector diagram of the collision scene was admitted as Ex. 9. RP 195.

indicated that Ms. Clemmer's car, a Chevy Cruze, had crossed over the center line, over the southbound lane and onto the southbound shoulder, where it collided with the Mazda in a nearly head-on manner. RP 273, 286. It appeared that the deceased had attempted to take evasive action by pulling onto the shoulder of the roadway to avoid the crash. RP 292.

WSP Detective Jordan Rippee visited the collision scene and then travelled to Sacred Heart Medical Center (SHMC) to contact Ms. Clemmer. RP 301-15. He arrived there around 9:15 p.m. RP 315. After a legal blood draw was performed upon Ms. Clemmer, she agreed to talk with him. RP 315. Ms. Clemmer informed Detective Rippee that prior to the crash she had been in Spokane at Walgreens and then had driven to her mother's house. There, she knocked on the door, but received no answer, so then she drove around Spokane Valley in an unsuccessful attempt to locate her. RP 318. Ms. Clemmer then travelled up Pines to Fancher and up to Division and stopped at a Jack in the Box to purchase a Papa [Joe] hamburger. RP 318-19. After picking up her food, she proceeded home towards Inchelium, but did not remember the collision. RP 320, 768. Ms. Clemmer informed Detective Rippee that she had consumed no alcohol that day, but she did take prescribed hydrocodone because of her chronic pancreatitis. RP 320. She stated she had taken half of her daily dose around 12:30 p.m.

that day, but then clarified that she was supposed to take 10 mg twice daily and she had taken her doses at 11:00 and at 3:00. RP 321.

Based on the inconsistencies in her responses, Detective Rippee opined that he believed she had either suffered some sort of head injury from the crash or was impaired or was being deceptive. RP 322. At that point, the conversation with Ms. Clemmer ended. *Id.*

However, on cross-examination, Ms. Clemmer's attorney, Tim Trageser, established that *prior* to Detective Rippee's arrival at the hospital at 9:45 p.m., Ms. Clemmer was administered 2 mg of hydromorphone, Dilaudid, intravenously at 7:51 p.m. and, again, at 9:15 p.m. RP 336-37; Ex. 39. Trageser also established that the treating physician had indicated Ms. Clemmer was treated aggressively with pain medications. RP 337. Detective Rippee was forced to agree with that assessment and was forced to admit that Ms. Clemmer had opiates administered by the attending physician at the emergency room prior to the state's blood draw. RP 336-39; Ex. 39. Detective Rippee also confessed that he did not know what drugs had been administered in the Life Flight Helicopter emergency trip to the hospital. RP 340. He also agreed that he had no reports of erratic driving in Spokane prior to the 911 calls, or on Highway 395 from Spokane to just before Deer Park. RP 490.

Dr. Robert Hagerty treated the defendant after she arrived at SHMC from the Life Flight critical care transport. RP 580-82. Dr. Hagerty noted the defendant received 50 micrograms of fentanyl on the flight to the hospital, and that fentanyl is a synthetic narcotic, an opiate, that is like a “very strong morphine.” RP 592.

When she arrived, he ordered a blood draw and a urine analysis drug screen. RP 585, 588. While the drug screen was positive for benzodiazepines, opiates, oxycodone and cannabis, RP 591, Dr. Hagerty admitted, on cross-examination, that those results were not quantitative tests, and would not aid the jury in determining whether benzodiazepine, marijuana or oxycodone were actually in the blood stream of Ms. Clemmer, because “the urine test does not tell us -- if there was any active drug in her system at the time of the accident.” RP 619, 630-31. Ms. Clemmer was also administered hydromorphone at the hospital, but this occurred after the first blood draw. RP 594.

The first blood draw was later tested at the Washington State Patrol Laboratory and Ms. Clemmer’s blood was found to contain hydrocodone in an amount of 0.077 mg per liter, which Forensic Scientist Ms. Kelly Daniel testified was above the typical therapeutic range of “approximately 0.01 to 0.05 mg per liter. RP 730, 752-53.

In examining the defendant, Dr. Hagerty found no injury that could have been the underlying cause of the accident. RP 595.³ Ms. Clemmer was taking prescribed Suboxone to assist her withdrawal from pain medication. RP 788. She was also taking hydrocodone and oxycodone. RP 790. Dr. Hagerty testified that people prescribed hydrocodone are warned that they are not to “drive, operate heavy machinery, climb ladders, anything that could be considered potentially dangerous because it can make you sleepy, drowsy, weak.” RP 598-99. It, like any opiate in a high dose, can also lower someone’s blood pressure. RP 599-60. Hydrocodone is an immediate release opiate, and people should not drive when taking hydrocodone. RP 663.

On cross-examination, Dr. Hagerty was asked whether he would agree that there was no indication in medical records that Ms. Clemmer came in to SHMC as an intoxicated person. RP 634. Dr. Hagerty explained he had noticed in his notes that the flight crew documented a Glasgow Coma Scale (GCS)⁴ of 12 which indicates an altered mental status; that a normal person would exhibit a GCS of 15. RP 635. Further, a GCS of 12 shows that

³ “I did not find any -- evidence or history that would support something that would cause an accident.” RP 597.

⁴ Dr. Hagerty explained that “GCS is -- stands for Glasgow Coma Scale. And it’s -- was developed in Scotland and it’s used by all -- pretty much around the world, physicians. It’s an objective way to kind of evaluate and say, ‘How’s somebody doing.’” RP 635.

the person is “not quite alert and awake, but -- they’re still -- they’re not comatose.” RP 635. When asked on cross-examination whether he thought Ms. Clemmer was impaired by drugs at the time he first saw her, 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. Dr. Hagerty testified that Ms. Clemmer’s blood pressure was not low enough to impair cognitive function after she arrived at the hospital and that she was never hypotensive. RP 646.

WSP Trooper Ryan Senger was a field training officer as well as a drug recognition expert. RP 397-404. On July 20, 2018, after signing into service at 7:00 p.m., Sergeant. Drout called and asked him to go to SHMC to contact Ms. Clemmer to assess her injuries and determine whether there was impairment involved in the collision. RP 403-04. He travelled to the SHMC trauma room and observed Ms. Clemmer screaming in pain. RP 406. He contacted her and noticed her eyes were very droopy which he stated was an indicator of impairment. RP 409. He had also received information from Sergeant. Drout detailing that the collision occurred on the shoulder of the oncoming lane, that there were four 911 calls reporting erratic driving prior to the collision, and that pills were found in Ms. Clemmer’s purse. RP 410. Based on all these factors, Trooper Senger determined that Ms. Clemmer was impaired. RP 410-11. A warrant for her

blood was authorized, and there were three unsuccessful attempts to draw blood prior to the fourth successful draw. RP 415. Trooper Senger noticed that Ms. Clemmer had several old scars on her arm that were consistent with failed attempts to inject drugs or draw blood. RP 418-19. He did not believe that these were related to the three failed attempts at the hospital to obtain a legal blood draw. RP 418-20.

However, on cross-examination, Trooper Senger was forced to admit that he did not know that the physicians were aggressively treating Ms. Clemmer with pain medication before he arrived at the hospital and made his observations. RP 424-25. He also confessed he could not determine whether his observations related to impairment of Ms. Clemmer were due to the Dilaudid/hydromorphone opiates that were administered to her prior to his arrival and prior to his observations of her, or by opiates she may have consumed prior to the collision. RP 425-26. He further confessed he was not aware of any of Ms. Clemmer's medical records or that her blood pressure dropped to critical levels. RP 436. He then *agreed* that during his direct examination he had "sanitized" the real conditions Ms. Clemmer was under involving emergency medical care but stated that the "sanitizing" was not purposeful. RP 436-37. Trooper Senger finally disclosed he was not aware that Ms. Clemmer had almost died prior to his interview or that she

had numerous prior hospitalizations as well as multiple prior blood draws just weeks prior to this incident. RP 437-38.

Dr. Hagerty was asked if he saw any evidence related to intravenous drug use on Ms. Clemmer's arms and he had no recollection of noticing any such evidence. RP 647, 649-50.

Ms. Clemmer testified that on July 20, 2018, around 11:15 a.m., she drove from her Inchelium home to Spokane to visit her mother. RP 769-70. She stated she had taken her prescribed medication, 7.5 mg of hydrocodone, before she left home. RP 770-71, 790-91. Ms. Clemmer stated she did not bring any of her medication with her when she left home. RP 771. She explained she is prescribed hydrocodone for pain associated with her pancreas. RP 772.

After being unable to locate her mother, Ms. Clemmer decided to drive home sometime in the afternoon. RP 773-74. She stopped at Zips to purchase some food. RP 774-75. Ms. Clemmer stated she could not remember anything after driving through Deer Park, including being stopped in the lane of travel, the collision, the helicopter transport, or anything she said to Trooper Field, Detective Rippee, or Trooper Senger. RP 775-76, 787, 793, 796-97. Ms. Clemmer revealed the last thing she remembered before the collision was a feeling of drowsiness. RP 783, 786,

795. She testified she remembered waking up in the hospital and being in pain. RP 775.

Ms. Clemmer testified she has been diagnosed with diabetes and has had prior episodes of high blood sugar. RP 779-81. She confessed that this ailment causes her to become drowsy, and it results in her becoming confused. RP 781. In fact, she remembered becoming sleepy while she was driving, but before the collision. RP 783. She admitted, on cross-examination, that she had told her children and a friend that, prior to the collision, she had fallen asleep. RP 786. She could not account for the statement related by Trooper Field that she was in a hurry to pick up her children from daycare, admitting that this could not be the case because her children were 24 and 26 years of age. RP 786-87. She admitted to taking prescribed suboxone because she was attempting to get off pain medication on her own. RP 788. She could not explain why there would be oxycodone in the hospital urinalysis other than to say she has active prescriptions for that as well as hydrocodone and that she does take oxycodone if she is in more pain because oxycodone is stronger than hydrocodone. RP 789-90.

The jury found Ms. Clemmer guilty as charged. CP 351; RP 868-70. 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, requiring Ms. Clemmer to pay supervision fees as determined by Department of Corrections; to undergo a drug/alcohol evaluation and to comply with any treatment recommendations; to not associate with known abusers of illegal drugs; and prohibiting alcohol usage and the possession of alcohol containers. CP 377-78; RP 902-03.

V. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN ADMITTING THE DEFENDANT'S STATEMENTS TO DETECTIVE RIPPEE AT TRIAL, AND, IF ERROR DID OCCUR, ANY ERROR IN SUCH ADMISSION WAS BOTH WAIVED AND HARMLESS BEYOND A REASONABLE DOUBT.

1. The defendant did not unambiguously invoke her right to counsel.

The defendant argues the trial court erred in admitting her statements to Detective Rippee during the July 20, 2018 interview, claiming that she unambiguously invoked her right to counsel prior to that questioning when she was asked questions by Trooper Senger, and therefore, she claims, law enforcement subsequently took her statement in violation of the Fifth Amendment. Br. at 23.

This Court reviews the trial court's conclusions of law de novo. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Prior to any custodial interrogation, a suspect must be informed of her right to remain silent, that her statements may be used against her in

court, that she has the right to the presence of an attorney and that if she cannot afford an attorney, one will be appointed for her prior to questioning. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Any waiver of a person's *Miranda* rights must be knowing, voluntary and intelligent. *State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). A suspect's Fifth Amendment privilege against self-incrimination and the corresponding right to be informed of his or her rights attach when custodial interrogation begins. *Miranda*, 384 U.S. at 479.

Law enforcement officers must immediately cease questioning a suspect who has unequivocally asserted his or her right to have counsel present during custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Radcliffe*, 164 Wn.2d at 906. Once a defendant has asserted the right to counsel, a waiver of that right is valid only if the police scrupulously honored the request, the defendant initiated further relevant conversation, and the defendant's waiver was knowing and voluntary. *State v. Earls*, 116 Wn.2d 364, 382-83, 805 P.2d 211 (1991). "Courts indulge every reasonable presumption against waiver of constitutional rights." *Id.* at 383.

In this case, the defendant's invocation of her right to an attorney was equivocal, at best; even if unequivocal, any error in the admission of these statements was both invited and harmless. It is well-established that

Miranda rights must be invoked unequivocally.⁵ *Radcliffe*, 164 Wn.2d at 906. Either a statement is an assertion of the right to counsel or it is not. *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The inquiry is objective – an invocation must be sufficiently clear “that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Id.* If the statement fails to meet the requisite level of clarity, *Edwards* does not require that officers stop questioning the suspect. *Id.* at 459.

Statements such as “maybe I should contact an attorney” and “[m]aybe I should talk to a lawyer,” are equivocal requests. *Radcliffe*, 164 Wn.2d at 907-08. Similarly, statements such as “if I’m going to be charged [I will need an attorney],” “if it goes farther [I will need an attorney],” and “I should have a lawyer ‘if this is going to get into something deep’” are equivocal or conditional statements of future intent; they are not unambiguous requests for counsel. *State v. Herron*, 177 Wn. App. 96, 103, 318 P.3d 281 (2013), *aff’d*, 183 Wn.2d 737 (2015); *State v. Lewis*, 32 Wn. App. 13, 15-16, 20, 645 P.2d 722 (1982). “Maybe,” “perhaps” and “if” are all conditional or obfuscating words. *See, e.g., State v. Nysta*,

⁵ The court does not draw distinctions between the invocation of any of the *Miranda* rights. *State v. Piatnitsky*, 180 Wn.2d 407, 413, 325 P.3d 167 (2014). “[T]here is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel.” *Berghuis v. Thompkins*, 560 U.S. 370, 381, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).

168 Wn. App. 30, 275 P.3d 1162 (2012), *as amended* (May 31, 2012). The court does not consider statements in isolation, but rather, in the context of the other statements made by a defendant. *Piatnitsky*, 180 Wn.2d at 411-12.⁶

At the CrR 3.5 hearing, Trooper Field, Trooper Senger, and Detective Rippee testified to statements the defendant had made. RP 23-52.

Trooper Field, who talked to Ms. Clemmer at the collision scene, testified that when he asked why she had been going so fast she responded that she was in a hurry to get her kids from day care. RP 25-26. When Trooper Field asked her why she was stopped in the middle of the roadway, she responded that she was off the roadway. RP 26.

Trooper Senger, who had travelled to the hospital and had informed Ms. Clemmer that she was under arrest, was questioned regarding what occurred after Ms. Clemmer was read her rights:

Q [by prosecutor]: Okay. And what -- when you gave her *Miranda* warnings what did she, I guess, did she agree to speak to you at that time?

A [Trooper Senger]: Yeah. After I gave her the warnings I asked if she understood and she advised that she did.

⁶ In *Piatnitsky*, the defendant was subjected to custodial interrogation during a murder investigation. He argued that his statement “I don’t want to talk right now, man” was an unequivocal invocation of his right to silence. However, the Court declined to look at this statement in isolation, but rather in light of the other statements the defendant made: he said, “I just write it down man. I can’t do this. I, I, I just write, man... I don’t want to talk right now, man.” 180 Wn.2d at 411-12.

Q: All right. And what did she say -- when you asked her if she'd talk to you[?]

A: She -- she asked about speaking to an attorney and said that she should speak with one first.

RP 34-35.

When asked how he interpreted that response from Ms. Clemmer,

Trooper Senger responded:

A: She didn't make a specific -- request -- excuse me -- at that point in time to speak with an attorney at that moment. And the way that she responded made it sound like she was not making a -- specific request to speak with one at that -- at that current moment.

RP 35.

Trooper Senger stated he *did not asked Ms. Clemmer any questions* because he was having a hard time understanding her responses because of her slurred speech. RP 36.

Later that evening, Detective Rippee arrived at the hospital and contacted Ms. Clemmer. After again advising her of her *Miranda* warnings, he asked if she was willing to speak with him. RP 40, 315. She consented to the conversation. RP 42. She informed the Detective that she was coming from her mother's house, after unsuccessfully attempting to contact her, and stopped at a Walgreens. RP 42, 318. She then stopped at a Jack in the Box on her way home to Inchelium for food. RP 320. She did not remember the collision. RP 42-43, 320. She had not been drinking. RP 320. She informed

him she takes prescribed hydrocodone for her chronic pancreatitis. RP 320. She stated she took half of her daily dose of hydrocodone at 12:30. RP 45, 320. She then corrected herself and stated she took her first dose at 11:00, and her second dose at 3:00. RP 45, 320-21.

At the end of the CrR 3.5 hearing, the defendant's attorney informed the Judge that he had *no problem* with the admission of any of these statements, other than the one statement made to Trooper Field, at the collision scene stating she was in a hurry to get her kids from daycare.

MR. TRAGESER: Judge, *my only issue* is with respect to the state's first witness, Trooper Field, and the incriminating statement in response to his question, "I was in a hurry -- to get my kids from day care."

RP 48 (emphasis added).

As to the statement made to Trooper Field, the trial court held that because Ms. Clemmer was not in custody, the statement was not subject to *Miranda* protections, a position that is not challenged on appeal. RP 50-51.

So, while I appreciate that there was a guilt-seeking question, I am unable to find that she was under -- in custody by Trooper Fields.

Trooper Senger did provide *Miranda* warnings, and Ms. Clemmer did not ask for an attorney. She said she should speak to an attorney first. That is clearly an ambiguous statement; it is not a clear or unequivocal request for an attorney. And in any event, Trooper Senger didn't ask any more questions after that.

There was an ambiguous request for -- for counsel, it was certainly not an unequivocal request, and therefore Detective Rippee properly provided -- *Miranda* warnings. The evidence is that Ms. Clemmer was able to make a knowing and voluntary choice to waive her right to an attorney or to remain silent and chose to speak with the detective, and therefore those statements are admissible as well.

RP 51. These oral findings are reflected in the trial court's written order.

See CP 217.

The trial court's holding that the defendant did not make an unambiguous request for an attorney is factually supported by Trooper Senger's testimony that her statement was not a request for an attorney at the present time, but more of a suggestion that perhaps she should speak to an attorney in the future. *See* RP 35. The trial court's conclusion that this type of request is, at best, ambiguous, is also in accord with similar requests examined in *Radcliffe*, 164 Wn.2d at 907-08, and *Herron*, 177 Wn. App. 96. This was not a statement that "amounts to an unequivocal assertion that [s]he now desired counsel." *Herron*, 177 Wn. App. 96. At best, it was unclear. There was no error in the trial court's determination that her statement regarding an attorney was equivocal. Therefore, the trial court properly admitted Ms. Clemmer's subsequent responses to Detective Rippee, responses that were made after

she was, once again, fully advised her of her *Miranda* rights and voluntarily waived the same.

2. Any error in the admission of the statements made to Detective Rippee was harmless.

“[A]dmission of an involuntary confession obtained in violation of *Miranda* is subject to treatment as harmless error.” *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991). The test for whether a constitutional error is harmless is whether the appellate court is convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error. *State v. Scherf*, 192 Wn.2d 350, 370, 429 P.3d 776 (2018).

Ms. Clemmer’s statements to Detective Rippee were harmless, generally innocuous, and generally helpful to her case. She informed the Detective that she was coming from her mother’s house after an unsuccessful attempt to contact her mother, and then stopped at a Walgreens and then stopped for fast food. RP 42, 318. Because the fact that she was the driver was attested to by at least five witnesses and was undisputed at trial, there was no harm in her admitting she was the driver. That she went to her mother’s residence and then for food does nothing to prove that she was under the influence or driving recklessly. Moreover, these statements matched her trial testimony and the testimony of other witnesses; therefore,

these statements given before trial would help dispel any potential argument that she was making up facts for trial. Additionally, the testimony aided the defendant's overall defense that she could remember things occurring before the accident, even though she could not remember the accident itself or the outrageous driving, supporting her claim that the driving must have been due to something other than ordinary intoxication, such as the usual or stereotypical, affected driver trial witnesses were familiar with.

Defendant's post arrest, pretrial statements regarding her lawful prescription for hydrocodone and her chronic pancreatitis was also beneficial to her case. That she took half of her daily dose at 12:30, then corrected that and stated she took her first dose at 11:00 and her second dose at 3:00, were statements that supported her trial testimony that she took prescribed medicine in measured doses for a diagnosed medical condition and, additionally, supported the defendant's theory that her outrageous, never-before-seen driving was due to another cause. That she was taking, or had ingested, hydrocodone was an unavoidable scientific conclusion; her pretrial statements helped explain the scientific measurements testified to by the WSP lab employee, and did so in a manner that did not suggest she made facts up *after* learning of the results of the test. This, again, made Ms. Clemmer appear more forthcoming and truthful, unlike some defendants that remain silent at the time of questioning and then "develop"

answers at trial. Therefore, the statements made to Detective Rippee were harmless in this case.

3. Invited error and waiver.

If there was error in the admission of the statements made to Detective Rippee, any error in this regard was invited. The defendant's attorney, Mr. Trageser, specifically advised the trial court, prior to its ruling on the admissibility of the statements, that the defense had *no issue* with, or objection to the statements, other than the one statement regarding the reasons for her speeding that were made to Trooper Field at the collision scene.⁷

The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create. *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), *aff'd*, 184 Wn.2d 207 (2015); *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999), *as amended* (July 2, 1999). The invited error doctrine precludes appellate review of an alleged error affecting even a constitutional right of a defendant. *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). To determine whether the invited error doctrine is applicable to a case, the court considers whether the petitioner affirmatively

⁷ MR. TRAGESER: Judge, *my only issue* is with respect to the state's first witness, Trooper Field, and the incriminating statement in response to his question, "I was 12 in a hurry -- to get my kids from day care." RP 45

assented to the error, materially contributed to it, or benefited from it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009); *In re Copland*, 176 Wn. App. 432, 442, 309 P.3d 626 (2013). Here, the defendant sought to exclude only the incriminating statement made to Trooper Field, making the tactical decision to allow the statements made to Detective Rippee because such statements aided, rather than hindered, their defense of the case. Therefore, any error in the admission of her statements to Detective Rippee was both invited and tactical.

B. MS. CLEMMER WAS NOT DENIED HER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Ms. Clemmer claims that she was deprived of her right to effective assistance of counsel by her attorney's failure to object to Trooper Senger's opinion testimony regarding impairment and by her attorney's failure to object to the admission of evidence regarding intravenous drug use.

Both claimed errors involve the failure to object. Failure to object claims are not subject to appellate review, generally, because RAP 2.5(a)(3) provides that appellate courts will not review a claim of error that was not raised in the trial court unless appellant can establish both that the error is one of constitutional magnitude and that the error was manifest. Respondent will deal with each of these evidentiary claims separately.

1. The opinion testimony by DRE Trooper Senger was admissible; any error in its admission was both harmless and invited. There is no showing of ineffective assistance of counsel in this instance.

a. The opinion testimony was admissible.

Trooper Senger had been with the WSP since 2012. He was a field training officer as well as a DRE. RP 397-404. At trial, he voiced an opinion, *on direct examination, without objection*, that based on all the circumstances⁸ Ms. Clemmer was impaired. RP 410.

Ms. Clemmer relies heavily on *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000), and *State v. Quaale*, 182 Wn.2d 191, 340 P.3d 213 (2014), for her proposition that she was denied effective assistance of counsel by her attorney's failure to object to this opinion of impairment. Br. at 33-36. Both cases are distinguishable from the present case because in both cited cases the evidentiary issue was placed directly before the trial court.⁹ Here, there was no objection to the admission of the evidence.

⁸ He observed that her eyes were watery and droopy, Sgt. Drout had informed him that she had been in a head-on collision on the wrong shoulder, that there were approximately four 911 calls reporting her vehicle as erratic before the collision, and that she had pills in her purse. RP 409-10.

⁹ In *Baity*, the parties specifically raised and argued the issue to the district court. That court decided the evidentiary issue. From those rulings, the State sought and received direct review by the Supreme Court. 140 Wn.2d at 1.

In *Quaale*, the defendant objected, claiming the officer's opinion (based solely on his HGN test) went directly to the ultimate issue. This objection was overruled. 182 Wn.2d at 195.

In *Baity*, the Supreme Court held that a law enforcement officer qualified as a DRE may provide expert testimony that a person's behavior or physical attributes are consistent with the use of certain categories of drugs. 140 Wn.2d at 17-18. However, the court stated a DRE witness cannot testify that a defendant exhibited a *specific level* of intoxication or impairment. *Id.* at 17. And a DRE witness "may not testify in a fashion that casts an aura of scientific certainty" over his or her opinion testimony. *Id.* at 17.

In *Quaale*, the Supreme Court further addressed the appropriate parameters of opinion testimony by a DRE expert witness. 182 Wn.2d at 193-202. In that case, an officer pulled over a driver who was speeding. *Id.* at 194. The officer performed an HGN test and observed that the defendant's eyes bounced and had difficulty tracking the stimulus. *Id.* at 194. The officer did not perform any other sobriety field tests. *Id.* The officer testified at trial that he formed an opinion, based on the HGN test alone, that the defendant was too impaired to operate a motor vehicle. *Id.* at 195. He also testified that "[t]here was no doubt he was impaired." *Id.*

The Supreme Court held that the officer's testimony was inadmissible under *Baity* for two reasons. *Id.* at 198-99. First, the officer "cast his testimony in a way that gave it an aura of scientific certainty." *Id.* at 198. The officer's opinion implied that the HGN test could reveal whether

someone was intoxicated and impaired when the test merely showed physical signs consistent with alcohol consumption. *Id.* at 198-99.

Second, the officer “testified to a specific level of intoxication when he testified that the defendant was ‘impaired.’” *Id.* at 199. The court stated that “the conclusion that the defendant was impaired rests in the premise that the defendant consumed a sufficient level of intoxicants to be impaired ... the testimony implicitly includes a *specific level of intoxication*; that the alcohol consumed impaired the defendant, which is the legal standard.” *Id.* (emphasis added). But the HGN test alone does not show specific levels of intoxication. *Id.*

The court in *Quaale* distinguished *City of Seattle v. Heatley*, in which the court held that an officer’s testimony that a defendant was “obviously intoxicated” and “affected” by alcohol was admissible. 70 Wn. App. 573, 579-82, 854 P.2d 658 (1993). In *Heatley*, the officer did not testify about technical procedures such as HGN tests or pupil dilation. *Id.* at 576. Instead, the officer testified that his opinion was based on his observations and all the tests he gave the defendant taken as a whole. *Id.* The court in *Heatley* held that the officer’s testimony was admissible as lay testimony because it was based on his experience and observations. *Id.* at 579-80. The court in *Quaale* stated that unlike the officer in *Heatley*, the

officer in *Quaale* based his opinion on expert testimony, not lay testimony. *Quaale*, 182 Wn.2d at 201.

Here, Trooper Senger testified extensively about the DRE protocol process and his experience in conducting DRE exams. RP 398-403; RP 408. Trooper Senger also stated that he generally observed Ms. Clemmer's movements and her responses to questions while at the hospital. RP 405-07. Based on his observations of her demeanor at the hospital, and the observations of others who had witnessed her driving, Trooper Senger formed the opinion that Ms. Clemmer was impaired at the time he was observing her at the hospital.

Trooper Senger's testimony is distinguishable from the officer's testimony in *Quaale*. First, *Quaale* focused solely on testimony regarding the HGN test. The court in *Quaale* emphasized that the officer's opinion was improper under the admissibility of scientific expert testimony standard discussed in *Baity* because the officer relied upon the HGN test alone and "[t]he HGN test alone cannot reveal specific levels of intoxication." 182 Wn.2d at 199. But Trooper Senger did not perform or mention an HGN test. Therefore, *Quaale* has limited application here. Second, unlike the officer in *Quaale*, Trooper Senger did not testify in a way that gave his opinion the aura of scientific certainty. He did not express any degree of

certainty and did not state that there was no doubt that Ms. Clemmer was under the influence or impaired.

Third, Trooper Senger did not expressly state that Ms. Clemmer's *ability to operate a vehicle* was impaired. In *Quaale*, the officer's objectionable statement came in response to a specific question of whether the defendant's ability to operate a motor vehicle was impaired. *Id.* at 195. Therefore, Trooper Senger's testimony was admissible and was not an impermissible opinion on Ms. Clemmer's guilt. The trial court did not abuse its discretion in admitting this testimony, especially without any objection.

b. Because defense counsel did not object, and because the admission of this limited testimony was arguably admissible, this Court should not consider an issue raised for the first time on appeal.

An appellate court will consider a claim of improper opinion testimony raised for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 926, 938, 155 P.3d 125 (2007). Improper opinion testimony is not a manifest constitutional error unless it is an explicit or nearly explicit opinion on an ultimate fact. *Kirkman*, 159 Wn.2d at 938. Here, the testimony was not an explicit opinion on an ultimate fact. It was not manifest for the very reason that the admissibility of the testimony is debatable. An error is "manifest" when it is "unmistakable, evident or

indisputable, as distinct from obscure, hidden or concealed.” *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

c. Any error in the admission of this limited opinion testimony was both harmless and tactical.

Additionally, the claim that the admission of such testimony establishes a claim of ineffective assistance of counsel is unwarranted where, as here, the decision to not object was tactical. Defense counsel did not object here, *as he often did*,¹⁰ because he knew he would (and did) decimate the testimony of Trooper Senger on cross-examination, placing all that testimony in question. On cross-examination, Trooper Senger was *forced* to admit that he did not know that the physicians were aggressively treating Ms. Clemmer with pain medication *before* he arrived at the hospital and observed Ms. Clemmer. He also confessed he *could not* determine

¹⁰ Ineffective assistance of counsel is a fact-based determination, and appellate courts review the entire record in determining whether a defendant received effective representation at trial. *Carson*, 184 Wn.2d at 215-16. Defendant’s counsel Timothy Trageser, WSBA #18704, is an experienced attorney admitted to the bar in 1989. The record establishes that he knew how to object, made many objections, and did not just sit idly by during trial. *See* RP 94 (Motion in Limine: objection to gruesome photos for medical examiner; overruled); RP 201 (speculation and foundation objection to trooper testifying regarding drug identification as to identity of pills; sustained); RP 285 (hearsay objection; sustained); RP 291 (lack of foundation for impairment opinion; sustained); RP 292 (objection to relevancy of preventability of accident; sustained); RP 322 (objection to hearsay regarding legal blood draw failure); RP 354 (objection to authentication of medical records without custodian; sustained); RP 413 (foundation as to scarring as signs of ingestion; sustained); RP 418 (unresponsive; sustained); RP 485-86 (foundation as to opinion of being under the influence; sustained); RP 729 (foundation for therapeutic level of hydrocodone; sustained).

whether his observations of Ms. Clemmer at the hospital that were consistent with impairment were the result of the Dilaudid/hydromorphone opiates that were administered to her *prior to his arrival*. RP 425-26. He further conceded he was not aware of *any* of Ms. Clemmer's medical records or her blood pressure. RP 427. In fact, defense counsel had Trooper Senger *agree* that during his direct examination he did not tell the jury the real conditions that Ms. Clemmer was under, but, instead, "*sanitized*" for the jury the real conditions Ms. Clemmer was under involving emergency medical care. RP 436-37. This left the trooper attempting to explain to the jury that the sanitizing was not purposeful. RP 436-37. Trooper Senger was also forced to admit he was not aware that Ms. Clemmer had almost died prior to his interview or that she had numerous prior hospitalizations as well as multiple prior blood draws just weeks prior to this incident. RP 437-38. Because Trooper Senger was forced to admit that any opinion as to impairment was erroneously based without knowledge of the facts, his impeached opinion was harmless, and counsel's failure to object was tactical.

d. The ineffective assistance claim fails because the decision to allow the witnesses' opinion, which was later decimated on cross-examination, was both tactical and harmless.

To establish ineffective assistance, a defendant must show both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322,

334-35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). Counsel's performance will not be considered deficient if it can be characterized as legitimate trial strategy. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)

As discussed above, counsel's decision to allow Trooper Senger's opinion into evidence in the first instance was highly tactical. It set up and allowed the decimating cross-examination of the trooper's baseless assumptions made without knowledge of the drugs administered by hospital and emergency staff prior to his arrival.

With respect to prejudice, a defendant must show "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Id.* at 862. Here, because the opinion was decimated on cross-examination, it was harmless and of little import in a case that was more about the reasons underlying the horrendous driving.

2. The failure to object to evidence regarding the difficulty in obtaining a blood draw due to track marks did not fall below professional norms where, as here, the objection would not have been sustained, and, moreover, counsel was pursuing a theory that the State was attempting to prejudice the defendant and was ignoring the fact that the defendant's outrageous driving was beyond what one would encounter in an ordinary impaired driver case.

Ms. Clemmer next argues that her counsel provided ineffective assistance by failing to object to evidence relating to the difficulty in obtaining a blood draw where the patient has track marks or bruising.

The standards governing this claim are well settled. Counsel's failure to live up to the standards of the profession will require a new trial when the client has been prejudiced by counsel's failure. *McFarland*, 127 Wn.2d at 334-35. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, courts apply a two-prong test: whether (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-92. When a claim can be resolved on one ground, a reviewing court need not consider both *Strickland* prongs. *Id.* at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

In instances, as here, where counsel failed to object to the admission of evidence, the *Strickland* standard requires the defendant show that the

failure to object fell below professional norms; that the objection would have been sustained; that counsel was not acting for tactical reasons; and, that the outcome of the trial would have been different. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). The first three portions of that test address the question of whether counsel erred, while the fourth addresses the question of actual prejudice.

Trooper Senger testified that he observed scarring on defendant's arm as she was being prepared for her blood draw. RP 413. He testified that he observed three failed physical blood draw attempts followed by a fourth attempt that was only able to obtain less than a quarter of one vial of blood, that usually they obtain two vials. RP 415. He explained how, based on his training as a DRE, scarring could make a blood draw more difficult, and that he observed scarring and bruising on Ms. Clemmer that "was consistent with" intravenous drug use or multiple unsuccessful attempts at sticking a needle into a vein or an arm. RP 419.

The phlebotomist, Ms. Galloway, also testified that such scarring makes it more difficult to draw blood, that there were three failed physical blood draw attempts followed by a fourth attempt that was only able to obtain less than a quarter of one vial of blood. RP 451-52.

Ms. Clemmer now claims that an objection "based on relevance" would have been sustained as to the admissibility of this evidence because

“the State alleged Ms. Clemmer was under the influence of hydrocodone which is only delivered to the body orally, not intravenously.” Br. at 38. This claim is factually and scientifically incorrect. Hydrocodone can be taken intravenously.¹¹ Trooper Senger testified that there’s multiple ways to ingest illegal drugs, “whether it’s orally, insufflation, which is snorting or -- puffing, smoking is a common -- and needles is -- intravenous is another -- is another common method.” RP 417. That this is another method by which Ms. Clemmer could have ingested hydrocodone was relevant to the fact that hydrocodone was found in her system.

The overarching relevance of the track marks was to explain why the sample taken from her arm for the “legal blood draw” was inadequate for testing¹² and to explain why the State had to get a warrant to preserve

¹¹ **Abuse of Hydrocodone**

The way a drug is taken directly impacts how quickly it’s absorbed into the bloodstream. Most hydrocodone is taken orally, but for some addicts, this isn’t enough. When swallowed, most people will take far more than is prescribed for pain, putting themselves at risk for developing liver damage.

Some users choose to inhale or inject the drug to get high faster. *Shooting is one of the most common alternatives to orally ingesting hydrocodone.* First, pills are crushed, then dissolved in water. Then the solution is injected into a vein, muscle, or just below the skins’ surface. Injecting is incredibly dangerous because this method delivery a potentially fatal dose of the drug. When taken in large doses, the acetaminophen found in hydrocodone can cause severe liver damage.

See <https://luxury.rehabs.com/iv-drug-use/shooting-hydrocodone-lortab-or-vicodin/> (last viewed May 22, 2020) (emphasis added).

¹² See, e.g., *United States v. Joseph*, 709 F.3d 1082, 1089 (11th Cir. 2013) (“Some patients had on their arms ‘track marks,’ which evidence drug abuse and make it difficult for nurses to find a vein to draw blood”).

and maintain the original “medical” blood drawn by Ms. Clemmer’s medical treatment team. During the week following the collision, Detective Rippee was informed that there was not enough blood obtained from the legal blood draw for testing purposes. RP 322-23. He called SHMC and put a hold on the “medical” blood that was taken when Ms. Clemmer arrived for treatment and then obtained a search warrant for that blood. RP 323-24.

Trial judges have great discretion with respect to the admission of evidence and will be overturned only for manifest abuse of that discretion. *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Had Mr. Trageser objected and had the trial court admitted the evidence for the purpose of explaining why a second blood test was necessary, this would satisfy the relevancy test in that it would make “the existence of any fact that is of consequence to the determination of the action more probable or less probable.” ER 401. Facts tending to establish a party’s theory of the case will generally be found to be relevant. *State v. Mak*, 105 Wn.2d 692, 703, 718 P.2d 407 (1986), *overruled on other grounds*, *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). “Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial.”

Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). “The ability of the danger of unfair prejudice to substantially outweigh the probative force of evidence is ‘quite slim’ where the evidence is undeniably probative of a central issue in the case.” *Id.* at 224. Therefore, appellant fails to establish that the trial court would have abused its discretion by admitting this evidence had an objection been lodged.

Additionally, the decision to not object was tactical. Following Trooper Senger’s direct examination, defendant’s counsel decimated Trooper Senger on cross-examination, having Senger confess that he did not know that Ms. Clemmer had been administered Dilaudid intravenously, twice. RP 424. Trooper Senger was also forced to agree that he was not aware of any of her medical records, and that he was not aware that she had been hospitalized recently for a condition and had her blood drawn at that time, which could account for the marks on her arm. RP 427. Trooper Senger was also asked if he was aware that the attending physician, Dr. Hagerty, had *no suspicion* of unlawful or curious injection sites, and while the court sustained the State’s objection that the defendant was asking about facts not in evidence, defense counsel later established impeaching evidence, through attending physician Dr. Hagerty, that the doctor did not recall seeing any evidence related to intravenous drug use on Ms. Clemmer’s arms, and that if there were any such marks, they could have

been from the blood draw that was performed a month earlier. RP 647, 649-50. The lack of objection to this testimony was in furtherance of defense counsel's desire to later effectively cross-examine Trooper Senger.

Finally, defendant fails to establish that the outcome of the trial would have been different had the track mark evidence been suppressed. The reckless prong of vehicular homicide is not contested by defendant. As to the impaired prong, Dr. Hagerty testified that people prescribed hydrocodone (at therapeutic levels) are not to "drive, operate heavy machinery, climb ladders, anything that could be considered potentially dangerous because it can make you sleepy, drowsy, weak." RP 598-99. Defendant had above therapeutic amounts of hydrocodone still in her system sometime after the collision. She admitted she was prescribed both hydrocodone and oxycodone, and that she was taking hydrocodone before the accident. She admitted to telling her daughter and a friend that she fell asleep prior to the accident and that she had experienced sleepiness before the collision. RP 783, 786. People observing her before the collision stated she "seemed very out of it," being either drunk or high or stoned, or under the influence of something. RP 383, 385. The ineffective assistance claim is without merit.

C. THE STATE DID NOT COMMIT MISCONDUCT IN ITS REBUTTAL CLOSING ARGUMENT. IF ANY ARGUMENT IS CONSIDERED IMPROPER, IT WAS EASILY CURABLE.

The defendant argues the State committed incurable misconduct during its rebuttal closing argument. 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. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If the defendant fails to properly object to the misconduct, she 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). "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.'" *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *Thorgerson*, 172 Wn.2d at 455).

A prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury during closing argument. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). "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.” *Emery*, 174 Wn.2d at 762. Under these standards, Ms. Clemmer fails to meet her burden.

Ms. Clemmer argues that the State impermissibly shifted the burden of production to the defendant in rebuttal closing argument by arguing she “knows she was driving under the influence. *She couldn’t even tell you she wasn’t*. RP 862.” Br. at 44 (emphasis the defendant’s), and, “*She didn’t even tell you it was an accident*. RP 862,” *id.* (emphasis the defendant’s). In neither case was there an improper shifting of the burden of proof.

The first statement, “*she couldn’t even tell you she wasn’t*” [driving under the influence], was a statement of fact based upon Ms. Clemmer’s testimony at trial. She could not say whether she was driving under the influence *when the question was directly posed to her on cross-examination*. See RP 791:

Q [By prosecutor]: You don’t actually know if you were under the influence of hydrocodone[?]

A [By defendant]: I don’t think that it was a level that would have affected me that way. I would have had it in my system, yes.

Moreover, *prior* to the State’s rebuttal argument, the defendant’s attorney discussed *this very issue* in his closing:

Ms. Clemmer testified, I thought very candidly. She really said, “I don’t know.” Even when asked, “Do you think the

hydrocodone could have affected (inaudible),” “I don’t know.” -- didn’t deny it. She didn’t take the stand and say this was caused because a bee flew in the window, or “a bird hit my windshield” -- could say that. She tried to deliver the best and most honest testimony that she could.

RP 853.

Even plainly improper remarks from a prosecutor do not merit reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Here, the State merely discussed the exact statements argued by the defendant in her closing. There was no error here. Moreover, the jury was directed to only consider the evidence and to “disregard any remark, statement, or argument that is not supported by the evidence or the law in [the court’s] instructions.” CP 329. It was also advised that the State has the burden of proving each element of each crime beyond a reasonable doubt and that “the defendant has no burden of proving that a reasonable doubt exists as to these elements.” CP 332. Juries are presumed to have followed the trial court’s instructions, absent evidence proving the contrary. *Kirkman*, 159 Wn.2d at 928.

Here, defendant fails to establish any misconduct occurred. If any comment were considered improper, such comment would have been easily cured by a reference to the court’s instructions above.

Likewise, the State did not engage in burden shifting when in *rebuttal*, it argued “*She didn’t even tell you it was an accident.*” As above, the defendant was the first to discuss the issue of her candor in revealing that she could not state she was not impaired, and the first to discuss at length the issue of intent – whether the facts gave rise to an inference that the collision was intentional or non-accidental:

When I evaluate this case, -- I can’t help but notice the driving is so extreme. I can’t help but notice that my client has -- taken prescription drugs for a long period of time. I can’t help but notice there’s no other evidence in anything in her past like this. I can’t help but notice the absolute craziness of the driving.

RP 855.

Was something else afoot -- other than intoxication from hydrocodone or driving recklessly. Was it medical. *Was it intentional.* How -- how will you know. (Inaudible) make arguments for any of them. I could. So could the state. And I could suggest all four of those to you, and try to get to agree on one. And that’s really what’s being done here. It’s being suggested to you.

RP 857 (emphasis added).

Finally, whether the collision was accidental is only marginally relevant to the reckless driving prong – the impaired prong has no mens rea or “accidental” element. One can drive recklessly and accidentally crash into someone. Because the defendant was the first to raise the issue of intent in her closing argument, there was no error in the State’s response that the

defendant could not say that the collision was accidental. She did take the stand and testify. Agreeing with the defendant that the collision was not accidental cannot be labelled misconduct, especially after the defendant concentrated in closing argument, as she did throughout the case, on the craziness of her driving. After establishing and conceding that the driving was *more* than reckless, the defendant cannot now complain where any response to her “intent” argument was invited and provoked by defense counsel. Also, the defendant’s current uncertain nod in the direction of prejudice is insufficient where an instruction could have easily cured any imagined problem with the State’s rebuttal closing. There was no misconduct, and there certainly was no incurable burden shifting.

D. THERE IS NO CUMULATIVE ERROR, WHERE, AS HERE, THERE IS NO PREJUDICIAL ERROR.

As explained above, the trial errors alleged are either unpreserved or lack merit (or both). The cumulative error argument fails.

E. WHETHER THE TRIAL COURT MUST STRIKE CERTAIN COMMUNITY CUSTODY CONDITIONS.

Each contested community custody condition will be discussed separately.

1. Supervision fees as determined by DOC.

The defendant’s failure to object when supervision fees were discussed and ordered by the trial court should not be reviewed.

RAP 2.5(a)(3). 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).

If this Court reviews this condition, this Court has held that the costs of community custody are discretionary and are subject to an ability to pay inquiry under *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), *review denied*, 193 Wn.2d 1007 (2019). Ms. Clemmer was indigent at the time of sentencing. Therefore, the trial court's imposition of community custody costs could be struck. However, this case need not be remanded for full hearing on the amendment of the judgment if this Court directs the sentencing court to strike this discretionary legal financial obligation, and if this Court rules that Ms. Clemmer need not be present during any remand hearing. *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011).

2. *Drug/Alcohol evaluation and treatment recommendations.*

As above, the defendant's failure to object allows this Court to decline to review this issue. Defendant was a self-admitted addict and had taken suboxone to reduce her dependencies on hydrocodone and oxycodone. She had benzodiazepines and THC in her urine. RP 626-29. She

also admitted to consuming alcohol but stated she did not on the day of the homicide. Her deadly and criminal collision was drug related. RP 902. The trial court found that a chemical dependency contributed to the offense. CP 394; RP 902.

The defendant fails to cite to the appropriate sentencing statutes in her brief. She cites RCW 9.94A.703(3)(c), (d), and (f). Br. at 53. She fails to cite 9.94A.703(4)(b)(i),¹³ which *requires* an alcohol and drug evaluation where, as here, the sentencing crime is a vehicular homicide (violation of 46.61.520(1)(a)), and the offense was alcohol or drug related. Moreover, because the defendant was found to have a chemical dependency that contributed to the offense, RCW 9.94A.607 allows the court to direct the defendant to obtain an evaluation as to the need for “dependency treatment related to the use of alcohol or controlled substances, *regardless of the particular substance that contributed to the commission of the offense.*” (Emphasis added). Therefore, there was no error in the trial court’s requirement of an alcohol/drug evaluation and any treatment recommended.

Additionally, the defendant’s argument that drugs and alcohol are different is not reflected in science or logic. Alcohol is a drug—albeit a legal one. California courts have *rejected* the idea that alcohol and drug abuse are

¹³ Because the offense date was July 20, 2018, the current community custody statute applies since it was effective July 1, 2018.

not reasonably related and have held that alcohol use is related to future criminality where the defendant has a history of substance abuse. *See People v. Cota*, 45 Cal. App. 5th 786, 792, 259 Cal. Rptr. 3d 419 (Ct. App. 2020), *as modified* (Mar. 20, 2020), *review denied* (May 13, 2020).¹⁴ It would make little sense to deprive Ms. Clemmer’s probation officer of the power to direct her away from alcohol, a substitute mind-altering substance, when her substance abuse history is so clearly demonstrated.

3. *Association with known abusers of illegal drugs.*

As above, the defendant’s failure to object allows this Court to decline to review this issue. *Peters*, 10 Wn. App. 2d at 583. The trial court did not abuse its discretion by prohibiting Ms. Clemmer from associating with known abusers of illegal drugs.¹⁵ She was found to be a drug dependent

¹⁴ Also see *People v. Beal*, 60 Cal. App. 4th 84, 87, 70 Cal. Rptr. 2d 80 (1997), *as modified on denial of reh’g* (Jan. 7, 1998):

Rather, empirical evidence shows that there is a nexus between drug use and alcohol consumption. It is well-documented that the use of alcohol lessens self-control and thus may create a situation where the user has reduced ability to stay away from drugs. (*See People v. Smith* (1983) 145 Cal.App.3d 1032, 1034, 193 Cal.Rptr. 825, citing Pollack, *Drug Use and Narcotic Addiction* (1967) University of Southern California Institute of Psychiatry and Law for the Judiciary, pp. 1-2, 4-5.) Presumably for this very reason, the vast majority of drug treatment programs, including the one Beal participates in as a condition of her probation, require abstinence from alcohol use. (Am. U. Sch. of Pub. Affairs, 1997 Drug Court Survey Report: Executive Summary, p. 49.)

¹⁵ Appellate courts review community custody conditions for an abuse of discretion and will reverse them if they are manifestly unreasonable. *State v. Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018).

individual; preventing her from having contact with people she *knows* are illegal drug abusers is rationally related to aid in her success at treatment, as ordered. This sentence condition could help eliminate situations where other abusers may tempt her, and, in that way, the condition helps prevent her from reoffending. The trial court did not go so far afield as to render this condition an abuse of its discretion.

4. Alcohol containers.

RAP 2.5(a)(3) should bar review of this argument. The defendant engages in hair splitting sophistry by conceding that the trial court's prohibition on alcohol is authorized yet claiming the requirement that the defendant not possess alcohol containers is an abuse of discretion. Alcohol and alcohol containers are not generally separate and distinct. The prohibition on the alcohol containers aids in assuring that the contents are not possessed. The containers and the alcohol are rationally related.

F. NOTICE TO DOL TO REVOKE THE JUVENILES DRIVING PRIVILEGES SHOULD BE CHANGED TO PROPERLY REFLECT HER ADULT STATUS.

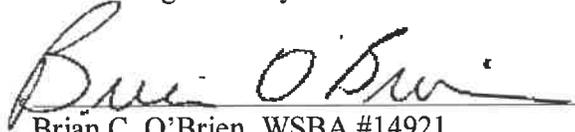
The State concedes that the scrivener's error regarding the notice to DOL to revoke the juveniles driving privileges should be changed to properly reflect her adult status. This may be done without a resentencing. *See Ramos*, 171 Wn.2d at 48 (a ministerial correction does not require a defendant's presence)

VI. CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the lower court, but remand to correct the scrivener's error.

Dated this 29 day of May, 2020.

TIMOTHY RASMUSSEN
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

Brian C. O'Brien, WSBA #14921
Special Deputy Prosecuting Attorney
Attorney for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, and e-mailed a true and correct copy to Jill Shumaker Reuter, admin@ewalaw.com and mailed a copy to Rebecca Anne Clemmer, #419382, Washington Corrections Center for Women, 9601 Bujacich Rd., NW, Gig Harbor, WA 98332-8300 on May 29, 2020.



Michele Lembcke, Legal Assistant
for Brian C. O'Brien

STEVENS COUNTY PROSECUTOR'S OFFICE

May 29, 2020 - 10:11 AM

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