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STATE OF WASHINGTON  
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NO. 36941-9-II

Lewis County No. 04-1-00872-1

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JOSE MORALES**

**Appellant.**

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**BRIEF OF APPELLANT**

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PM 9-9-08

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**A. ASSIGNMENTS OF ERROR**

**I. THE TRIAL COURT ERRED WHEN IT CONCLUDED, AS A MATTER OF LAW, THAT THE EVIDENCE FOUND INSIDE MR. MORALES' CAR WAS ADMISSIBLE UNDER THE DOCTRINE OF INEVITABLE DISCOVERY.**

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**IV. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR VEHICULAR ASSAULT BY RECKLESS DRIVING.**

**V. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR DRIVING UNDER THE INFLUENCE.**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**I. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF BEER CANS AND BOTTLES FOUND DURING AN ILLEGAL SEARCH OF MR. MORALES' CAR.**

**II. THE TRIAL COURT ERRED WHEN IT ADMITTED MR. MORALES' BLOOD TEST WHERE THE SPECIAL EVIDENCE WARNING WAS NOT READ TO HIM.**

**III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. MORALES' CONVICTION FOR DRIVING UNDER THE INFLUENCE AND THE FINDING, BY SPECIAL VERDICT, THAT MR. MORALES CAUSED BODILY INJURY TO ANOTHER WHILE DRIVING UNDER THE INFLUENCE.**

**IV. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE FINDING, BY SPECIAL VERDICT, THAT MR. MORALES CAUSED BODILY INJURY TO ANOTHER BY DRIVING IN A RECKLESS MANNER.**

**C. STATEMENT OF THE CASE**

**I. PROCEDURAL HISTORY**

The Lewis County Prosecuting Attorney charged Jose Morales by Fourth Amended Information with Count I: Hit and Run—Injury; Count II: Vehicular Assault; and Count III: Driving Under the Influence. CP 2-3. A fourth count on that Information, Count IV: Driving While License Suspended in the First Degree was dismissed the morning of trial. CP 3, Report of Proceedings Vol. I. Mr. Morales was found guilty of each count. CP 26-29. Mr. Morales received a standard range sentence. CP 35. This timely appeal followed. CP 40.

**II. FACTUAL HISTORY**

On November 3<sup>rd</sup>, 2004, Mr. Jose Morales was involved in a traffic collision on SR 507 in Lewis County. RP Vol. I, p. 5.<sup>1</sup> After the collision, Mr. Morales continued without stopping to give the required information and stopped about a mile away from the collision scene on SR 507, where he was detained by William Oberg. RP Vol. II, p. 127, 154. Mr. Oberg,

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<sup>1</sup> The Report of Proceedings containing the 3.5 and 3.6 hearing and the jury trial begin on September 10, 2007 and are numbered as volumes I, II, and III. They are referenced in this brief as RP. Vol. I, II, and III. There are other hearing transcripts that are referenced by their date.

along with his brother Robin, had been driving southbound on SR 507 when he passed a car going the other direction that was heavily damaged with the hood sticking up in front of the windshield and steam coming from the engine compartment. RP Vol. II, p. 154. There was a lone male driver. RP Vol. II, p. 156. Mr. Oberg continued on SR 507 and came upon a car in the bushes off the side of the road at a curve at Big Hanaford Road. RP Vol. II, p. 155. Learning there had been a collision he turned around to follow the damaged car that he had passed on SR 507. RP Vol. II, p. 155. He eventually came upon a car parked on the side of the road, which was the same car he passed earlier with heavy damage. RP Vol. II, p. 155.

Mr. Oberg watched as Mr. Morales got out of the driver's side door and walked to the rear of the vehicle. RP Vol. II, p. 156-57. Mr. Oberg, who is a retired police officer, told Mr. Morales to get down on the ground and Mr. Morales complied, at which time Mr. Oberg pulled Mr. Morales' arm behind his back and placed his knee in the small of Mr. Morales' back. RP Vol. II, p. 157. Mr. Oberg did not notice any odor of alcohol on Mr. Morales. RP Vol. II, p. 160. Eventually Trooper Thornburg arrived and immediately handcuffed Mr. Morales. RP Vol. II, p. 167.

Trooper Thornburg moved Mr. Morales to a seated position and claimed that he smelled an "obvious" odor of intoxicants and that Mr. Morales' eyes were bloodshot and watery. RP Vol. II, p. 168-69. He questioned Mr. Morales and Mr. Morales told him a white car pulled out in front of him. RP Vol. II, p. 169. Thornburg asked Mr. Morales if he had been drinking and Mr. Morales said he had consumed one beer. RP Vol. II, p. 170. Thornburg arrested Mr. Morales for hit and run and searched his person incident to arrest. RP Vol. I, p. 62, Vol. II, p. 173. Thornburg found a set of keys and a Washington State ID card. RP Vol. I, p. 62. After Mr. Morales was transported from the scene by an ambulance, Thornburg searched his car and found two full beer bottles and one full beer can, as well as two empty cans. RP Vol. I, p. 62, Vol. II, p. 173. Thornburg saw, prior to entering the car to search it, two beer cans on the right front seat of the car. RP Vol. I, p. 67. From his vantage point outside the car he couldn't tell if the cans were opened or closed. RP Vol. I, p. 67. Thornburg testified that Mr. Morales' car was impounded and that they do inventory searches of impounded vehicles as a standard practice. RP Vol. II, p. 70.

Marilyn Robertson, age 67, was driving along SR 507 with her 79 year-old mother, Nancy Gunn, in a Dodge Spirit. RP Vol. II, p. 115-16, 189-90. She was driving about forty miles per hour. RP Vol. II, p. 131.

The speed limit was thirty-five miles per hour. RP Vol. II, p. 119. As Ms. Robertson was coming around the curve near Big Hanaford Road, she saw Mr. Morales' car come through the stop sign at Big Hanaford Road. RP Vol. II, p. 118-19. She believed that Mr. Morales did not stop at the stop sign, but said he was driving slowly. RP Vol. II, p. 119. She did not have time to avoid his car and their cars collided. RP Vol. II, p. 118. Ms. Robertson suffered from sore, painful knees as a result of the accident, and sustained several bumps and bruises. RP Vol. II, p. 122. She got a brief look at the driver, and noticed that he was male and was alone. RP Vol. II, p. 125-26.

Ms. Gunn, Ms. Robertson's mother, suffered a broken ankle and a twisted foot. RP Vol. II, p. 134. She was in a cast for six months. RP Vol. II, p. 136. Her recollection of the collision was that Mr. Morales didn't stop at the Big Hanaford Road stop sign. RP Vol. II, p. 134.

Steven Orr, who witnessed the accident, described Mr. Morales as having "rolled the stop sign." RP Vol. II, p. 259.

Trooper Brunstad went to the scene of Mr. Morales' arrest. RP Vol. II, p. 201. He also claimed to smell an odor of intoxicants on Mr. Morales and to have noticed bloodshot and watery eyes. RP Vol. II, p. 201. At the hospital, Trooper Brunstad solicited the help of a Spanish interpreter. RP Vol. II, p. 207. However, the State did not call the

interpreter to testify at trial and never identified him. Report of Proceedings, Vol. II. As such, the court disallowed testimony from Trooper Brunstad about Mr. Morales' statements, as it was required to do under *State v. Garcia-Trujillo*, 89 Wn.App. 203, 948 P.2d 390 (1997). RP Vol. II, p. 99. Defense counsel objected to the admission of Mr. Morales' blood test because the only evidence regarding the special evidence warning was that Trooper Brunstad handed the warning to the interpreter, and listened as the interpreter spoke in a language he didn't understand. RP Vol. II, p. 207, 220, 244. The special evidence warning, which purportedly contained Mr. Morales' signature, was not offered into evidence by the State. RP Vol. II, p. 245. Trooper Brunstad does not speak Spanish and had no idea what the interpreter said to Mr. Morales. RP Vol. II, p. 220. As such, defense counsel argued, it must be presumed that the special evidence warning was not read to Mr. Morales. RP Vol. II, p. 245. This, defense counsel argued, rendered the blood test inadmissible. RP Vol. II, p. 245.

The State argued that because the blood test was compulsory, the special evidence warning is not required. RP Vol. II, p. 245. The court ruled that the blood test was admissible because there is no requirement whatsoever that the special evidence warning be read to a defendant under arrest for vehicular assault. RP Vol. II, p. 252-255. The court stated:

Subsection three [of RCW 46.20.308] is an exception to the consent statute that does not require consent. I also believe it doesn't require the administration of any warnings. And just because the State Patrol makes a form that would include some of these warnings doesn't make it that those are then obligated to be read to the individual...No warnings need be given under subsection three.

RP Vol. II, p. 252-53. The blood test was admitted as exhibit 39. RP Vol. II, p. 255. The result of the test was .12. RP Vol. II, p. 255, Exhibit 39.

The State elected to proceed under the "affected by" prong, rather than the "per se" prong for the Vehicular Assault by DUI (Count II) and the DUI (Count III) because the blood test occurred outside of the two hour period immediately following the collision. RP Vol. III, p. 273.

At the 3.6 hearing on the first morning of trial, defense counsel moved to suppress the evidence found in Mr. Morales' car, arguing the search of the car did not fall within the search incident to arrest exception to the warrant requirement because Mr. Morales had been transported from the scene prior to the search. RP Vol. I, p. 86-88. The court agreed, holding the search was not justified by the search incident to arrest exception.<sup>2</sup> RP Vol. II, p. 100. The court ruled, however, that the evidence found in the car was nevertheless admissible under the doctrine of inevitable discovery, because Thornburg testified that he would have

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<sup>2</sup> The court did not enter written findings of fact and conclusions of law. Instead, the court made detailed oral findings of fact and conclusions of law. RP Vol. II, p. 95-101. Appellant submits that these oral findings and conclusions are sufficient for appellate review.

conducted an inventory search after the impoundment of the car. RP Vol. II, p. 100.

The court made oral findings of fact and conclusions of law, which, Appellant submits, are sufficient to allow appellate review of the court's ruling. RP Vol. II, p. 100. The findings of fact and conclusions of law on Mr. Morales' motion to suppress the evidence found during the search of his car are as follows:

Now to the 3.6 issue of the search. The initial search was of the defendant himself where the trooper found identification and two keys. Pursuant to the testimony and my findings, those occurred while he was in custody, after he was arrested...and that search was proper incident to arrest. The identification of the keys are not excluded. The further search, there's three other items that I could see. One was beer cans that could be seen from outside the car, beer cans that couldn't be seen until the car was searched, and the fact the key fit the ignition. Those all, I believe are the remaining three searches. The beer cans, two on the right front seat seen from outside looking in are admissible. The remaining beer cans and the fact that the keys fit the ignition were the search that was done after the arrest but after the defendant had left the area. So it wasn't incident to arrest. I was done after the fact. However, there was also testimony that the car was impounded and inventoried. And the case law says that the means of obtaining the evidence must be truly independent and discovery of those means would have been truly inevitable. And I believe that even though—well, I'm finding that the exclusionary rule's applicable unless the state establishes that they would have been inevitably discovered. Under the circumstances they would have been. The beer cans and the fact the key fit the ignition are admissible and won't be suppressed as well.

RP Vol. II, p. 99-100.

At trial, pictures were admitted into evidence of the beer bottles and cans that were found during the search of the car. Exhibits 8 and 9. Trooper Thornburg testified before the jury that he found two full beer bottles, one full beer can, and two empty beer cans. RP Vol. II, p. 173. The picture admitted as exhibit 8 depicted two Keystone beer cans on the right front seat, and the picture admitted as exhibit 9 depicted a box of Budweiser behind the driver's seat. RP Vol. II, p. 174. Describing this box, Thornburg said: "And then in this photo you can't really identify anything inside the box, but it's Budweiser, flow pack box, it appears to be, and is a plastic bag." RP Vol. II, p. 174.

Defense counsel conceded Mr. Morales' guilt on Count I, felony hit and run. RP Vol. III, p. 304. He argued the evidence was insufficient to prove vehicular assault (Count II) or DUI (Count III). RP Vol. III, p. 296-316. The jury returned verdicts of guilty on all three charges, and returned a special verdict as to the vehicular assault finding Mr. Morales was operating the motor vehicle while under the influence of intoxicating liquor, was operating the motor vehicle in a reckless manner, and was operating the motor vehicle with disregard for the safety of others. CP 26-29.

A lengthy sentencing hearing was conducted, in which the court found that counts II and III encompassed same criminal conduct. CP 31.

Defense counsel mounted several successful objections to the State's initial calculation of Mr. Morales' offender score. Report of Proceedings (10-30-07). Mr. Morales agrees with the trial court's final calculation of his offender score. CP 31-32. Mr. Morales was given the top of the standard range for each count. CP 35. This timely appeal followed. CP 40.

**D. ARGUMENT**

**I. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF BEER CANS AND BOTTLES FOUND DURING AN ILLEGAL SEARCH OF MR. MORALES' CAR.**

The search of Mr. Morales' car violated article I, section 7 of the Washington State Constitution. The trial court concluded, as a matter of law, that the search of Mr. Morales' car was not a search incident to arrest. Mr. Morales does not assign error to this conclusion. The court erred, however, when it concluded that the evidence found during that search was nevertheless admissible under the doctrine of inevitable discovery. The State cited no authority for this position, nor did the court cite any authority for this ruling. In *State v. O'Neill*, the Washington Supreme Court held that where a police officer conducts a search prior to a lawful arrest, the State cannot justify the search on the basis that a lawful arrest followed the search. *State v. O'Neill*, 148 Wn.2d 564, 591, 62 P.3d 489

(2003). The Court further held that such a search could not be justified under the doctrine of inevitable discovery because “it would undermine our holding that a lawful custodial arrest must be effected before a valid search incident to that arrest can occur.” *O’Neill* at 591. The Court specifically held open the question whether the rule might apply in another context under article I, section 7, a question they have not yet decided. *O’Neill* at 591.

Under the inevitable discovery rule, the State must prove by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered using lawful procedures. *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501 (1984); *O’Neill* at 591. The inventory search is a recognized exception because, unlike a probable cause search and a search incident to arrest, the purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function. *State v. Smith*, 76 Wn.App. 9, 13, 882 P.2d 190 (1994), *Colorado v. Bertine*, 479 U.S. 367, 373, 97 S.Ct. 2476 (1977); *State v. Garcia*, 35 Wn.App. 174, 665 P.2d 1381, *review denied*, 100 Wn.2d 1019 (1983). The often-cited reasons justifying the inventory search are to protect the arrestee's property from unauthorized interference while he is in jail; to protect the police from groundless claims that property has not been adequately safeguarded during detention; and to

avert any danger to police or others that may have been posed by the property. *Smith* at 13. . Knowledge of the precise nature of the property protects against claims of theft, vandalism, or negligence. *Smith* at 13.

Here, this Court should not allow the State to hind behind the inevitable discovery doctrine because the purpose of this search was to look for evidence of an incriminating nature, not to inventory Mr. Morales' property for his own protection and for the protection of the State Patrol. Trooper Thornburg believed this was a search incident to arrest and his intention was to look for further evidence of alcohol consumption or drug consumption. Thornburg could have easily applied for a warrant to search the car; the scene was secure and there was no danger of evidence being destroyed, as Thornburg agreed in his testimony. The only reason not to seek a warrant was that it was inconvenient and because Thornburg erroneously believed he had the right to search a vehicle incident to arrest even when the arrestee is no longer at the scene. To allow the State to justify this search as an inventory search would create an incentive, in cases such as this where the arrestee is injured and transported from the scene before the officer has an opportunity to search, for officers to impound vehicles, whether impoundment is necessary or not, in order avoid the warrant requirement. This would frustrate the

protections of article 1, section 7, just as the Supreme Court feared in *O'Neill*.

The trial court should have suppressed the evidence found during the search of the car, as well as the pictures that were taken from the interior of the car (Exhibits 8 and 9), because they are the fruit of an illegal search of Mr. Morales' vehicle.

**II. THE TRIAL COURT ERRED WHEN IT ADMITTED MR. MORALES' BLOOD TEST WHERE THE SPECIAL EVIDENCE WARNING WAS NOT READ TO HIM.**

In ruling on the admissibility of the blood test, the court seemingly acknowledged that, similar to the 3.5 statements made to the interpreter at the hospital, the State could not establish, without calling the interpreter to testify, what was actually read to Mr. Morales. As such, there was no evidence that he was read the special evidence warning advising him of his right to additional testing. Defense counsel specifically objected to the admission of the blood test on the grounds that the State was required to inform Mr. Morales of his right to additional testing and their failure to do so required exclusion of the test. The court held that RCW 46.20.308 (2), which requires an officer to inform the arrested subject of his right have additional tests administered by any qualified person of his or her own choosing, does not apply to vehicular assault or vehicular homicide. The court arrived at this conclusion because 46.20.308 (2) codifies the right of

a subject arrested for driving under the influence, physical control or minor operating a motor vehicle after consuming alcohol to refuse the breath or blood test. As such, the court held, this subsection does not apply to those who are under arrest for vehicular homicide or vehicular assault because those subjects do not have the right to refuse. The court concluded that the Washington State Patrol must have invented the special evidence warning out of thin air and put it on the implied consent form needlessly.

The court's ruling is in direct conflict the Washington Supreme Court's holding in *State v. Turpin*, in which it held that the ability of the State to *compel* a blood test does not negate the requirement that the State must inform the person of his or her right to additional, independent testing. *State v. Turpin*, 94 Wn.2d 820, 824-25, 620 P.2d 990 (1980). In *State v. Anderson*, Division I held that persons under arrest for vehicular assault or vehicular homicide must be advised of their right to additional testing of their blood by a qualified person of their own choosing. *State v. Anderson*, 80 Wn.App. 384, 909 P.2d 945 (1996). The Court held that RCW 46.20.308 requires that subjects be informed of their right to additional testing and that subsection (3) of that statute merely codifies the limited circumstances in which a subject lacks the right to refuse the test. *Anderson* at 385, fn 1. RCW 46.20.308 (3) does not, however, stand for

the proposition that persons arrested for vehicular homicide or assault lack the right to additional testing. "Supreme Court precedent requires that a person who submits to a blood test at the direction of the State be informed of his/her statutory right to an additional test by a qualified person of his or her own choosing. *Anderson* at 388, citing *State v. Turpin*, 94 Wn.2d 820, 824-25, 620 P.2d 990 (1980); *State v. Dunivin*, 65 Wn.App. 501, 503, 828 P.2d 1143 (1992). The remedy for failing to advise a subject of his or her right to additional testing is suppression of the blood test. *Turpin* at 390; *Anderson* at 388.

Because there is no evidence Mr. Morales was advised of his right to additional testing, the blood test result admitted as Exhibit 39 was inadmissible. Because the remaining evidence was not sufficient to prove that Mr. Morales was operating a motor vehicle while under the influence of intoxicants, his conviction for driving under the influence under Count III and the jury's special verdict finding as to Count II that he operated the motor vehicle while under the influence should both be reversed and dismissed (discussed in Section III, below). However, should this court conclude that a reasonable trier of fact could find there is sufficient evidence of the elements of those crimes beyond a reasonable doubt, Mr. Morales' case should be remanded for a new trial so a jury can decide this case anew, using only properly admitted evidence.

**III. THE EVIDENCE IS INSUFFICIENT TO PROVE THAT MR. MORALES WAS OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, REQUIRING REVERSAL OF THE JURY'S SPECIAL VERIDCT FINDING TO THAT EFFECT AND REQUIRING REVERSAL OF MR. MORALES' CONVICTION FOR DUI UNDER COUNT III.**

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the State must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). A sufficiency claim admits the truth of the State's evidence. *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205, *cert. denied*, 127 S.Ct. 440 (2006). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). In considering sufficiency of the evidence, the Court will give equal weight to circumstantial and direct evidence. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The Court will not substitute its judgment for

that of the jury on issues of fact. *State v. King*, 113 Wn.App. 243, 269, 54 P.3d 1218 (2002).

For purposes of this argument, Mr. Morales will assume this Court agrees that the blood test and the evidence of beer found in the car (other than the two cans seen on the front seat from a lawful vantage point) was erroneously admitted into evidence and this assignment of error is being reviewed with the remaining admissible evidence.

The State was required to prove that Mr. Morales drove a motor vehicle while his ability to drive was lessened in any appreciable degree by alcohol. *State v. Hurd*, 5 Wn.2d 308, 105 P.2d 59 (1940); *State v. Hansen*, 15 Wn.App. 95, 546 P.2d 1242 (1976). Here, the State failed to meet that burden of proof. There were no field sobriety tests conducted on Mr. Morales, not even the horizontal gaze nystagmus which could have been conducted while Mr. Morales was being treated at the hospital. William Oberg, the retired police officer who first contacted Mr. Morales and detained him on the ground with his knee smelled no odor of intoxicants about Mr. Morales. Although Trooper Thornburg saw two cans of beer on the front seat of Mr. Morales' car, he could not say whether they were empty or full, and obviously couldn't say whether they were cold to the touch. Mr. Morales said he had only one beer. Absent the improperly admitted blood test and the improperly admitted evidence

of the other beer cans found in the car during the illegal search, no rational trier of fact could have found Mr. Morales guilty of driving under the influence, and vehicular assault by being under the influence, on such slim evidence. Mr. Morales' conviction for driving under the influence, and the special finding that he caused substantial bodily injury to another by driving under the influence, should be reversed and dismissed.

**IV. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE FINDING, BY SPECIAL VERDICT, THAT MR. MORALES CAUSED BODILY INJURY TO ANOTHER BY DRIVING IN A RECKLESS MANNER.**

To operate a motor vehicle in a reckless manner, for purposes of the vehicular assault statute, means to operate a motor vehicle in a manner that is rash, heedless or careless manner or in a manner showing indifference to the consequences. *State v. Hill*, 48 Wn.App. 344, 348, 739 P.2d 707 (1987); *State v. Partridge*, 47 Wn.2d 640, 645-46, 289 P.2d 702 (1955); *State v. Fately*, 18 Wn. App. 99, 105-06, 566 P.2d 959 (1977).

The testimony from the witness stand established that Mr. Morales rolled through the stop sign at Big Hanaford Road at about 15 miles per hour. The testimony also established that Ms. Robertson was traveling about 40 miles per hour in a 35 mile per hour zone and did not have time to brake before Mr. Morales' car collided with hers. This, by itself, is not sufficient evidence that Mr. Morales was driving in a rash, heedless or

careless manner or a manner showing indifference to the consequences. Ms. Robertson testified she was coming around a curve, approaching Big Hanaford Road. This evidence, without more, does not even approach the level of recklessness. The State must have recognized this because in its closing argument to the jury, it relied heavily on the fact that Mr. Morales had a blood alcohol level of .12 as evidence of his heedlessness and indifference to others, as well as a statement made *after* the collision by Mr. Morales in which he allegedly said he didn't care about the people in the other car. RP Vol. III, p. 294.

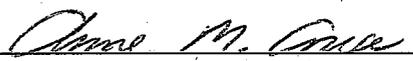
Because the blood test should have been suppressed, it should not be included in the evidence this Court considers in deciding whether the evidence is sufficient to prove recklessness. Further, the statement allegedly made by Mr. Morales at best conveys his state of mind at the moment he said it, and not his state of his mind at the time of the collision. Without evidence of Mr. Morales' blood alcohol level, the evidence was insufficient to prove that Mr. Morales operated the motor vehicle in a reckless manner. The special verdict finding Mr. Morales operated a motor vehicle in a reckless manner should be reversed and dismissed.

#### **E. CONCLUSION**

Mr. Morales' conviction for Driving Under the Influence should be reversed and dismissed. The special verdicts as to Count II finding that

Mr. Morales operated a motor vehicle while under the influence of alcohol and in a reckless manner should be reversed and dismissed. Alternatively, Mr. Morales' convictions for driving under the influence and vehicular assault should be reversed and remanded for a new trial. At re-trial, the evidence found during the illegal search of Mr. Morales' car and the blood test should be suppressed.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of September, 2008.

  
ANNE CRUSER, WSBA #27944  
Attorney for Mr. Morales

## APPENDIX

### 1. § 46.61.506. Persons under influence of intoxicating liquor or drug -- Evidence -- Tests -- Information concerning tests

(1) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug, if the person's alcohol concentration is less than 0.08, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug.

(2) The breath analysis shall be based upon grams of alcohol per two hundred ten liters of breath. The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug.

(3) Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

(4) (a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

(i) The person who performed the test was authorized to perform such test by the state toxicologist;

(ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;

(iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

(b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

(c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

(5) When a blood test is administered under the provisions of RCW 46.20.308, the withdrawal of blood for the purpose of determining its alcoholic or drug content may be performed only by a physician, a registered nurse, a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.71A RCW, a first responder as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood. This limitation shall not apply to the taking of breath specimens.

(6) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his or her own choosing administer one or more tests in addition to any administered at the direction of a law enforcement officer. The test will be admissible if the person establishes the general acceptability of the testing technique or method. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

(7) Upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or her or his or her attorney.

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STATE OF WASHINGTON

BY ASW

DEPUTY

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

STATE OF WASHINGTON,

Respondent,

vs.

JOSE MORALES,

Appellant.

) Court of Appeals No. 36941-9-II  
) Lewis County No. 04-1-00872-1

) AFFIDAVIT OF MAILING

ANNE M. CRUSER, being sworn on oath, states that on the 8<sup>th</sup> day of September 2008, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Lori Smith  
Lewis County Deputy Prosecuting Attorney  
360 N.W. North St.  
Chehalis, WA 98532

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Mr. Jose Morales

**Anne M. Cruser**

*Attorney at Law*  
P.O. Box 1670  
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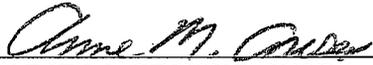
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Clallam Bay, WA 98326

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. MORALES)
- (3) AFFIDAVIT OF MAILING

Dated this 8<sup>th</sup> day of September 2008,

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: September 8, 2008, Kalama, WA

Signature: Anne M. Cruser