

73045-2

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No. 73045-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

AZEB WELDETENSAY ABAY,

Appellant.

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

The Honorable Regina S. Cahan

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BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Azeb Abay, a particularly inexperienced driver, accidentally struck a pedestrian as she turned her car onto SR 522. In shock, she slowly drove on, “praying... looking for a safe place to pull over.” She did not immediately cross through a bus lane and into private parking lots because she was panicked and did not think the maneuver safe given the heavy traffic. Ms. Abay worried for the pedestrian she hit and had no intention of fleeing. As she told the arresting officer who waved her off the roadway, she was doing her best to stop safely.

The conviction for felony hit and run injury should be reversed because the State failed to prove that Ms. Abay’s failure to return to the scene to provide her information and render any aid was the result of a voluntary act. To the contrary: she was in custody and could not comply. In the alternative, the verdict – which did not specify which of her statutory duties she failed to carry out – violated Ms. Abay’s right to a unanimous verdict. Finally, because the term “as close thereto as possible,” was unconstitutionally vague as applied to her conduct, the conviction should be reversed on that basis as well.

B. ASSIGNMENTS OF ERROR

1. In the absence of proof beyond a reasonable doubt of each element in the “to convict” instruction, Ms. Abay’s conviction for felony hit and run injury deprives her of due process under the Fourteenth Amendment of the United States Constitution.

2. The trial court violated Ms. Abay’s right to a unanimous verdict under Article I, Section 21 of the Washington State Constitution.

3. The term “as close thereto as possible” used in the felony hit and run injury statute is unconstitutionally vague as applied to Ms. Abay in violation of the Fourteenth Amendment of the United States Constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amend. XIV. The State took on the burden of proving Ms. Abay failed to fulfill “all” four duties that apply to a driver who had been in an injury accident. CP 26-27. However, she wanted to go back to the person she injured, but her arrest made it impossible to return to the scene, give her identifying information, or render aid. Where the State did not prove the alleged failures were the result of a voluntary act, should the hit and run conviction be set aside for insufficient evidence?

2. The right to a unanimous jury guaranteed by Article I, section 21 is violated where the jury is instructed on alternative means but does not provide a particularized expression of unanimity as to which alternative(s) its verdict rests upon. In such cases the conviction must be reversed unless there is sufficient evidence to support each alternative. The State called on the jury to convict Ms. Abay if she “failed to do one” of her duties, but the jury was not instructed that it had to be unanimous as to which one Ms. Abay failed to perform. Should this Court reverse the conviction because there is insufficient evidence to establish that Ms. Abay’s failure to comply with three out of the four statutory obligations was the result of a voluntary act?

3. A statutory term is unconstitutionally vague where it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. Ms. Abay’s defense rested on arguing to the jury her inexperience as a driver, state of being in shock following the accident, and traffic conditions all impacted how close to the scene of the accident she was able to stop. Is Ms. Abay entitled to reversal of her conviction because it rested on a term that failed to provide an ascertainable standard of guilt and by its open-ended nature, allowed the jurors to decide guilt from a purely subjective point of view?

D. STATEMENT OF THE CASE

Appellant Azeb Abay was convicted of a single felony offense of hit and run (injury). CP 40-46. The State had alleged that on March 20, 2014, she violated RCW 46.52.020(1) and (4)(b), by being knowingly involved in a motor vehicle accident resulting in injury, and then failing “to carry out all of the following duties: 1) immediately stop her vehicle at the scene of the accident or as close thereto as possible; 2) immediately return to and remain at the scene of the accident until all duties are fulfilled;” 3) give her identifying information, and, 4) render reasonable assistance to the injured person. CP 7-8.

Ms. Abay is an Ethiopian-born immigrant and speaks little English. 12/2/14 RP 144. At the time of the accident, she had lived in this country less than three years. 12/2/14 RP 144. She had only been a driver for five months. 12/2/14 RP 149.

On her way home from work in Kirkland, she turned onto SR 522 (Bothell Way) at the intersection with 73<sup>rd</sup> as pedestrians crossed in both directions. 12/2/14 RP 146-47. One person “happen[ed] to be behind them or in a spot [she] couldn’t see,” and she hit the man with her car. 12/2/14 RP 145, 148.<sup>1</sup>

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<sup>1</sup> That pedestrian, Kristian Henrickson, had little to no recollection of the incident. 12/1/14 RP 39-61. The trial court admitted a video clip from a camera he was

She was shocked. 12/2/14 RP 148. There were cars all around. 12/2/14 RP 149. She saw the police – Deputy Ebinger essentially happened upon the scene – and she was thinking of where to stop. 12/2/14 RP 149. She wanted to calm herself down, “but as soon as I saw the police car I knew I would be stopping.” 12/2/14 RP 150.

Panicked, she was unsure if she could change lanes. 12/2/14 RP 159. There were driveways around; she stopped where she thought she could stop safely. 12/2/14 RP 152, 154. Before then, “to [her] at the time there were too many cars.” 12/2/14 RP 159, 160. She was “praying... looking for a safe place to pull over.” 12/2/14 RP 162. She did not run; she “only wanted to be safe.” 12/2/14 RP 163. She wanted to go back to the person she had injured. 12/2/14 RP 163.

Witness Wendy Hutchins testified that it looked as if the driver “thought the people were clear of the crosswalk and they weren’t.” 12/2/14 RP 108. The driver paused, then kept going and Ms. Hutchins followed. 12/2/14 RP 111-112. The traffic was so bad that Ms. Hutchins helped Deputy Ebinger maneuver through it. 12/2/14 RP 117. Another witness, Laura Hagen-Hughes, also saw the accident. 12/2/14 RP 125-26.

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carrying at the time. (Ex. 3; RP 82-83.) He received treatment for a cut on his head. 12/2/14 RP 94. (The cut was cleaned and closed. 12/2/14 RP 98-99.) Medical professionals saw no evidence of head or neck injury. 12/2/14 RP 96. Mr. Henrickson was given Tylenol and was released that same day. 12/2/14 RP 97, 100.

“The driver was not going particularly fast. There was a pause and then it was like they were just driving forward.” 12/2/14 RP 132. There was a whole lot of traffic: “cars were coming out of Safeway and they come across the bus lane and it gets pretty jammed.” 12/2/14 RP 140. This witness thought the driver “was kind of maybe shocked or stunned and then made a bad decision and kept going.” 12/2/14 RP 140. Ms. Hagen-Hughes described that stretch of Bothell as very busy: “it’s a highway... you don’t get out of your car.” 12/2/14 RP 141.

Deputy Ebinger was on the scene right after the accident. 12/2/14 RP 24, 112. He looked and saw Ms. Abay’s SUV in heavy traffic. 12/2/14 RP 23-24, 48-49. The car was just “rolling at a very slow speed.” 12/2/14 RP 48, 52. The driver seemed to have a cell phone in her hand. 12/2/14 RP 30-32, 51. The officer pointed and the driver also pointed, indicating she would be pulling over. 12/2/14 RP 29, 50. The driver, Ms. Abay, then went through the adjacent bus lane and pulled over, into a RiteAid driveway. 12/2/14 RP 31, 71, 86.

The officer said that he followed Ms. Abay a distance akin to five blocks, and while there were no cross-streets in that span of SR 522, her car had passed a string of driveways. 12/2/14 RP 43-45, 53. When the officer spoke with Ms. Abay, she was shaken-up, excited, and nervous. 12/2/14 RP 63, 65. He asked her what had happened and what she was

doing. He testified she said she was trying to stop and was looking for a place to stop. 12/2/14 RP 69.

Jury instruction No. 7 set out the State's burden of proof in the case. CP 26-27. Elements (1), (2), (3), and (5) called for proof that Ms. Abay was a driver who was knowingly involved in an accident within Washington State. CP 26. Element (4) reads as follows:

- (4) That the defendant failed to satisfy her obligation to fulfill all of the following duties:
  - (a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible;
  - (b) Immediately return to and remain at the scene of the accident until all duties are fulfilled;
  - (c) Give her name, address, insurance company, insurance policy number and vehicle license number, and exhibit her driver's license, to any person struck or injured;
  - (d) Render to any person injured in the accident reasonable assistance including the carrying or making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or such carrying is request by the injured person or on her behalf; and

CP 26-27.

In closing argument, defense counsel pointed out that the statute does not require that a driver who was in an accident stop at the scene, but rather, "as close thereto as possible." 12/3/14 RP 23-24. Defense counsel noted that the case turns on the meaning of the (unfortunately) undefined term. 12/3/14 RP 22, 24. Defense counsel argued that not all drivers are of

equal ability and that Ms. Abay's level of inexperience and the stress of the situation mattered in deciding whether she complied with her duty to stop close to the scene of the accident. 12/3/14 RP 23, 26-28.

The prosecutor, however, told the jury to reject that interpretation of the undefined term:

Whether Ms. Abay herself believes that it was safe for her to pull over after passing eleven driveways going five city blocks. *That is irrelevant. Her own personal belief.* It is your job to decide whether she failed to stop.

12/3/14 RP 36 (emphasis added).

Ms. Abay was convicted as charged and appealed. CP 15.

E. ARGUMENT

WHETHER ANALYZED AS A HICKMAN PROBLEM, AGAINST THE REQUIREMENT OF UNANIMITY, OR THROUGH THE LENS OF THE VAGUENESS DOCTRINE, THE CONVICTION CANNOT STAND.

**1. The State did not prove beyond a reasonable doubt that Ms. Abay committed a hit and run.**

- a. Due process required the State prove each element of the offense beyond a reasonable doubt.

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Appendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25

L. Ed. 2d 368 (1970). Evidence is sufficient only if, reviewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Even when additional elements are added to the “to convict” instruction, and the State does not object, the additional element becomes the “law of the case” and must be proved beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). If the State failed to meet this burden with respect to the added element, the conviction must be dismissed. Id. at 103.

- b. The State did not prove beyond a reasonable doubt that Ms. Abay voluntarily chose not to return to the scene to give her information and render any aid, where she was prevented from doing so by her arrest.

Jury instruction No. 7 set out what the State had to prove beyond a reasonable doubt to secure a conviction in the case. CP 26-27. Elements (1), (2), (3), and (5) called for proof that Ms. Abay was a driver who was knowingly involved in an accident within Washington State. CP 26.

Element (4) reads as follows:

- (4) That the defendant failed to satisfy her obligation to fulfill **all of the following duties:**
  - (a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible;

- (b) Immediately return to and remain at the scene of the accident until all duties are fulfilled;
- (c) Give her name, address, insurance company, insurance policy number and vehicle license number, and exhibit her driver's license, to any person struck or injured;
- (d) Render to any person injured in the accident reasonable assistance including the carrying or making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or such carrying is request by the injured person or on her behalf; **and**

CP 26-27 (emphasis added).

By this phrasing and grammatical structure (the use of the words “all” and the conjunctive “and”) the State was obligated to prove that Ms. Abay failed to discharge “all” four duties. Hickman, 135 Wn.2d at 99. Even setting aside the contested question of whether Ms. Abay stopped “as close thereto as possible” when she drove into the RiteAid parking lot, the State did not meet its burden because her arrest made it impossible for Ms. Abay to voluntarily comply with the other three duties. As in State v. Eaton, 168 Wn.2d 476, 229 P.3d 704 (2010), the State’s proof is insufficient, because given the arrest of Ms. Abay, the evidence does not support finding that she volitionally failed to return to the scene to give her identifying information and render aid.

Eaton involved the appeal from a jury special verdict finding that the defendant possessed methamphetamine while in a jail. Eaton was arrested for driving under the influence and taken by police to the jail. Id.

at 479. Jail staff searched Eaton and discovered some methamphetamine he had hidden in his sock. Id.

On appeal, this Court reversed the trial court's imposition of the sentencing enhancement, reasoning that the State failed to prove Eaton acted voluntarily. State v. Eaton, 143 Wn.App. 155, 164-65, 177 P.3d 157 (2008). The Supreme Court agreed, emphasizing the long-standing tradition that "people are punished only for their own conduct" and "[w]here an individual has taken no volitional action she is not generally subject to criminal liability." Eaton, 168 Wn.2d at 481. The Court made a point most applicable to Ms. Abay's situation: "We punish people for what they do, not for what others do to them. We do not punish those who do not have the capacity to choose." Id. at 482.

The Court went on to affirm that there is "a certain minimal mental element required in order to establish the actus reus itself" . . . It is this volitional aspect of a person's actions that renders her morally responsible and her actions potentially deterrable." Id. at 482 (quoting State v. Utter, 4 Wn.App. 137, 139, 479 P.2d 946 (1971)). "As a cautionary example," the Eaton opinion referenced "the notorious English case of Rex v. Larsonneur where the defendant, a French woman, was convicted of being in the United Kingdom unlawfully, "despite the fact that she had been brought to the United Kingdom from Ireland by the

police, against her will.” Id. at 483, note 4, citing Rex v. Larsonneur, 149 L.T. 542, 544 (1933).

Turning to the specifics of Eaton’s predicament, the Court wrote:

*Once Eaton was arrested, he no longer had control over his location. From the time of arrest, his movement from street to jail became involuntary: involuntary not because he did not wish to enter the jail, but because he was forcibly taken there by State authority. He no longer had the ability to choose his own course of action.*

Id. at 484 (emphasis added).

Ultimately, the Court declared: “After [Eaton] was arrested, there was nothing he could have reasonably done to avoid being taken to jail.

The State failed to meet its burden of proof that Eaton volitionally possessed drugs inside the [jail] enhancement zone.” Id. at 487.

Accordingly, the Supreme Court affirmed this Court’s order vacating the sentence enhancement. Id. at 488.

Like Eaton, once arrested, Ms. Abay had no ability to choose whether she would be returning to the scene of the accident to exchange information and provide aid to Mr. Henrickson. She had testified this had been her intent: “I wanted to go back to the person I injured... And the police officer came right away.” 12/2/14 RP 163. The police officer arrested her, put her in his squad car, and drove her to the scene himself. 12/2/14 RP 33, 85, 136-37. In Eaton, the Supreme Court noted that for

crimes that criminalize a failure to act, “it is the defendant’s choice not to act that renders him criminally liable.” Id. at 482, note 2. But Ms. Abay could not voluntarily return because she was in custody.

The “to convict” instruction required that the State prove beyond a reasonable doubt that Ms. Abay failed to discharge “all” of her duties. Eaton makes clear that she cannot be held criminally liable for that which was not voluntary. Under Hickman, the conviction cannot stand.

c. This Court must reverse and remand with instructions to dismiss the conviction.

Since there was insufficient evidence to support Ms. Abay’s conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. State v. Crediford, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), quoting Burks v. United States, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

**2. If analyzed through the prism of the requirement of unanimity, the case also calls for reversal.**

Ms. Abay expects the State to argue that despite the “all” wording of the “to convict” instruction, the State could meet its burden of proof merely by demonstrating that Ms. Abay failed to “[i]mmediately stop the

vehicle at the scene of the accident or as close thereto as possible,” as opposed to having to prove all four alternate means in which the statute could be violated. CP 26. At trial, despite the wording of the jury instruction, that is what the prosecutor argued: “I have a burden to prove that she failed to do at least one of these duties... As your duty as jurors, you only have to find that she failed to do one.” 12/3/14 RP 15. However, in the absence of a special verdict form, that suggestion runs counter to the requirement of unanimity.

Article I, section 21 requires a unanimous jury verdict in criminal matters. When the State alleges a defendant has committed a crime by alternative means, and the jury is instructed on multiple means, the right to a unanimous jury requires the jury unanimously agree on the means by which it finds the defendant has committed the offense. State v. Owens, 180 Wn.2d 90, 323 P.2d 1030 (2014). If the jury returns “a particularized expression” as to the means relied upon for the conviction, the unanimity requirement is met. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). However, “[a] general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means.” State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010).

Each provision of a statute is intended to “effect some material purpose.” Vita Food Products, Inc. v. State, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). “The drafters of legislation . . . are presumed to have used no superfluous words and [courts] must accord meaning, if possible, to every word in a statute.” State v. Roggenkamp, 153 Wn. 2d 614, 624, 106 P.3d 196 (2005) (Internal citations and brackets omitted.) The language of the law indicates that the Legislature intended to create alternative means of violating the hit-and-run law.

A driver who had knowingly been in an injury accident, may violate RCW 46.52.020 by *either* failing to stop, *or* by stopping, but failing to remain on the scene to exchange information, *or* by stopping, exchanging information, but not rendering aid.

Here, the jury returned a general verdict, one without “a particularized expression of unanimity” as to any one specific alternative. The jury was not instructed that it must unanimously agree as to the alternative means. In the absence of a particularized finding of unanimity as to the means, Ms. Abay’s conviction must be reversed unless each alternative is supported by sufficient evidence. Owens, 180 Wn.2d at 99. They are not.

As explained above, the Eaton case demonstrates that there is a failure of proof with respect to the three duties that Ms. Abay could not

perform because she was in custody. Consequently, as argued above, there was insufficient evidence presented to support the offense as the jury was charged. Because the State did not offer sufficient evidence to support three out of the four alternative means of failing to comply with the duties that arise following an accident, these alternative means must be dismissed and the case remanded for a new trial. Owens, 180 Wn.2d at 95; Ortega-Martinez, 124 Wn.2d at 707-08.

**3. The statutory phrasing “as close thereto as possible” was unconstitutionally vague as applied to Ms. Abay’s actions.**

- a. Statutes must contain ascertainable standards to guide the police and juries in enforcing the law.

A statute is unconstitutionally void for vagueness if it (1) does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is proscribed, or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The vagueness doctrine is aimed at preventing the delegation of “basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Johnson v. United States,

135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015) (striking down a sentencing provision of the Armed Career Criminal Act on vagueness grounds because “the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges” in violation of due process).

A statute is unconstitutionally vague on this ground if it “contain[s] no standards and allow[s] police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.” Douglass, 115 Wn.2d at 181, quoting State v. Maciolek, 101 Wn.2d 259, 267, 676 P.2d 996 (1984). The statute must “provide ‘minimal guidelines ... to guide law enforcement.’” Douglass, 115 Wn.2d at 181, quoting State v. Worrell, 111 Wn.2d 537, 544, 761 P.2d 56 (1988). A criminal law will not survive a vagueness challenge “merely because there is some conduct that clearly falls within the provision’s grasp.” Johnson, 135 S.Ct. at 2561.

The constitutionality of a statute is reviewed *de novo*. City of Spokane v. Neff, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). Where a vagueness challenge does not implicate the First Amendment, the statute is evaluated as applied to the particular facts of the case and the party’s conduct. City of Seattle v. Montana, 129 Wn.2d 583, 597, 919 P.2d 1218 (1996).

Since the conduct alleged to have been committed by Ms. Abay was not core First Amendment conduct, the statutes must be evaluated as applied. Ms. Abay submits the statute – specifically the undefined term “as close thereto as possible” – lacks ascertainable standards to prevent arbitrary enforcement.

- b. The term “as close thereto as possible” as used in Ms. Abay’s case is unconstitutionally vague.

The felony hit and run statute does not require that a driver stop at the scene of an accident under all circumstances. Rather, the statute permits a driver to stop “as close thereto as possible.” However, the statute fails to demark any frame of reference for what the term means. Furthermore, the statute fails to specify the point of view from which the question of “as possible” is to be judged.

Here the State alleged and argued that although Ms. Abay pulled into the RiteAid parking lot, it was not close enough. The statute provided no frame of reference against which the prosecutor’s accusation could be tested. Ms. Abay drove past some driveways, but not past any intersection. Would a different police officer, or prosecutor, or jury reach the same conclusion? What if Ms. Abay had calmed down sooner and pulled over into an earlier driveway? What if she had pulled over just as she did, but then started to walk back quickly to the scene? Because nothing in the

statute gives even “minimal guidance” on how to judge a driver in these circumstances, the meaning of “close” becomes entirely subjective.

Moreover, here, Ms. Abay attempted to explain herself. A rookie driver in a state of panic, she told the officer that she was only looking for a safe place to stop. 12/2/14 RP 69. She told the jury she wanted to go back to where the accident was. 12/2/14 RP 163.

Her explanation appears reasonable, but at trial, the prosecutor made the argument that her subjective state of mind about this event was “irrelevant.” 12/3/14 RP 36. Because the statute does not say whether the phrase “as close thereto as possible” is to be evaluated from the point of view of the driver, or from the point of view of an objective observer, or from some hybrid of the two<sup>2</sup>, the argument was permitted.

“Offenses that do not have a mens rea element are generally disfavored.” State v. Bradshaw, 152 Wn. 2d 528, 536, 98 P.3d 1190 (2004). Here, the prosecutor argued that the jury should disregard Ms.

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<sup>2</sup> For example, the lawful use of force standard,

incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

Abay's perspective on the event that led to her arrest and prosecution and adopt his point of view on the matter. The instructions – which did not define the term and which did not provide any guidance as to what a jury can, and cannot consider in answering this question – allowed the argument to be made.<sup>3</sup> This lack of guidance in turn made the judging of Ms. Abay's driving an entirely subjective matter.

Defense counsel tried to have the jury consider Ms. Abay's state of mind, but that request was not grounded in any instructions on the law. Thus, jurors had unfettered discretion to choose what the law was. There was nothing stopping them from adopting the prosecutor's assertion that Ms. Abay's state of mind was "irrelevant" and looking at the facts from the prosecutor's perspective.

As applied to Ms. Abay, the statutory term "as close thereto as possible," was unconstitutionally vague because it failed to provide ascertainable standards to protect against arbitrary enforcement. The residual clause struck down by Johnson v. United States, was deemed to be unconstitutionally vague because it left "grave uncertainty about how to estimate the risk posed by a crime," before a prior offense would be

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<sup>3</sup> Ms. Abay's concerns about the impact of her stopping after the accident – declared by the prosecutor to be "irrelevant" – were in fact appropriate. The last phrase within RCW 46.52.20(1) states that "every such stop" (be it at the scene or "as close thereto as possible") "shall be made without obstructing traffic more than is necessary."

labeled a violent felony triggering serious sentencing repercussions. 135 S. Ct. at 2557. Similarly, there is grave uncertainty about how to decide whether a particular driver stopped “as close thereto as possible” to an accident scene, or continued driving. Ms. Abay’s conviction should be reversed and dismissed.

F. CONCLUSION

For the reasons stated, Ms. Abay asks this Court to reverse her conviction for felony hit and run injury with instructions to dismiss for a failure of the State to prove the offense. Dismissal is also appropriate because the conviction was based on an unconstitutionally vague term.

Alternatively, Ms. Abay asks this Court to reverse her conviction and remand for a new trial as the conviction below was obtained in violation of the right to a unanimous verdict.

DATED this 2<sup>nd</sup> day of November 2015.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 73045-2-I
	)	
AZEB ABAY,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SHORELINE, WA 98177	( )	_____

**SIGNED** IN SEATTLE, WASHINGTON THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2015.

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