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Supreme Court No. 99639-3
(COA No. 80277-1-I)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SARAH ADAMS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Sarah Adams, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Ms. Adams seeks review of the Court of Appeals decision dated March 8, 2021, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it determined the warrantless seizure of bodily fluids was justified by exigent circumstances when the government did not establish clear and convincing evidence that such exigent circumstances existed?

2. Was severance of the charge of possession of a controlled substance required where the possession charge was unrelated to the evidence necessary to prove the more serious charge of vehicular homicide?

D. STATEMENT OF THE CASE

Before trial, Ms. Adams challenged the warrantless seizure of her blood by the police. CP 126. The police arrested Ms. Adams after they decided they had probable cause that she caused an accident resulting in death because of her impairment or recklessness. RP 78. Rather than seek a warrant, the officer in charge decided to rely on the exigent circumstances exception to seize Ms. Adams' blood.

Ms. Adams argued this exception did not apply. RP 183-84. The government established that when they arrived at the accident, Ms. Adams was in the back of an ambulance. RP 113. Her Subaru was upturned, and hypodermic needles were on the ground outside the car. RP 116.

The officers suspected Ms. Adams was impaired but confirmed the paramedics did not intend to give Ms. Adams any medicine or intravenous fluid that would alter her blood. RP 74, 127. There was no testimony the paramedics ever intended to alter Ms. Adams' blood before the police could secure a warrant. RP 127.

The officer in charge made clear from his arrival at the scene that he would not be securing a warrant. RP 95, 113. He detailed the people at the location, including an available officer to stay with Ms. Adams if medical personnel decided to alter her blood. RP 113. The officer stated time constraints made it impossible to secure a warrant. RP 78. Specifically, the officer said he was worried he would not be able to find a prosecutor to help him obtain a warrant, although he did not make any efforts to try. RP 66.

Securing a warrant would take 40 to 60 minutes while taking Ms. Adams' blood without a warrant took about 40 minutes. RP 131, 114. Without consent or a warrant, the police seized Ms. Adams' blood. RP 132.

The government charged Ms. Adams with vehicular homicide based on impairment and recklessness. CP 10-11. The government also charged her with possession of a controlled substance based on heroin found in her car. *Id.* Ms. Adams moved to sever these charges because the blood sample the police seized contained no heroin, testing positive

for methamphetamine instead. CP 128. Because the possession of heroin was not relevant to the charge of vehicular homicide and because mixing the charges would be confusing to the jury, Ms. Adams moved for severance. *Id.* The court denied Ms. Adams' motion. RP 304.

Ms. Adams was found guilty of both charges. RP 1332. The jury was not unanimous as to whether impairment or recklessness caused the accident. *Id.* The court sentenced Ms. Adams to 114 months, the top end of the range for vehicular homicide. CP 86.

The Court of Appeals determined the government proved by clear and convincing evidence the exigent circumstances exception to the warrant requirement applied. App. 1, 7. It held Ms. Adams' failure to renew her motion to sever waived the issue. App. 1, 12. Finally, the Court agreed that dismissal of the controlled substance charge was required. App. 1, 13.

E. ARGUMENT

1. This Court should review whether the trial court erred when it did not suppress evidence seized from Ms. Adams' body without a warrant.

Before trial, Ms. Adams challenged the legality of a warrantless seizure of her blood. CP 126. In its opinion, the Court of Appeals held that the trial court did not err when it allowed the government to use evidence it seized without a warrant. App. 7. Because this decision conflicts with other decisions published by the Court of Appeals, involves a significant question of constitutional law, and is an issue of substantial public interest, this Court should grant review. RAP 13.4(b).

The Fourth Amendment to the United States Constitution and Article I, § 7 of the Washington State Constitution prohibit warrantless searches and seizures. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). When the government invades a person's body to draw blood, the intrusion constitutes a search and seizure, triggering constitutional protections. *Missouri v. McNeely*, 599 U.S. 141,

148-49, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013); *Garvin*, 166 Wn.2d at 249. Absent a recognized exception, a warrantless blood draw is unlawful. *McNeely*, 599 U.S. at 148-49.

The Court of Appeals held that the blood draw was constitutional under the exigent circumstances exception. App. 12. This exception only applies where “obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.” *State v. Tibbles*, 169 Wn.2d 364, 370, 236 P.3d 885 (2010). This exigency exception may only be employed when “obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence.” *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). Here, the evidence did not establish such an exigency.

When the police arrived at the accident scene, Ms. Adams was in an ambulance. RP 113. While the paramedics were treating her, they had not given her any intravenous

fluids or pain medication. RP 50. When the officer asked the paramedics whether they intended to give her intravenous fluids before they took her to the hospital, the paramedics told the officer they did not so intend. RP 127.

In fact, no medical personnel ever told said they needed to introduce substances into Ms. Adams' blood that would alter its contents. RP 127, 109. At best, the officer thought the paramedics would. RP 78. This mistaken belief does not establish an exigency. RP 78.

Nor was timing an issue. Officers told the court that getting a warrant would take 40 minutes to an hour. RP 131. The warrantless blood draw took place 40 minutes after the police first established probable cause. RP 97. This amount of time was not a significant delay, especially since the government offered no evidence that substances in Ms. Adams' blood might dissipate in the extra twenty minutes it would take to comply with the warrant requirement.

The officers also told the court they were not confident they could find a prosecutor who would secure a warrant for

them. Again, the police made no efforts to contact a prosecutor. RP 66. Without knowing whether a prosecutor was available, the officer's guess does not establish clear and convincing evidence that an exigent circumstance existed.

The government has the burden to establish their warrantless search fell within a closely guarded exception to the warrant requirement. *State v. Grinier*, 34 Wn. App. 164, 168, 659 P.2d 550 (1983). This Court should accept review to correct the Court of Appeals' error in finding to the contrary.

The Court of Appeals relies on *State v. Inman* to justify its holding. App. 9 (citing *Inman*, 2 Wn. App.2d 281, 409 P.3d 1138 (2018)). However, as the Court of Appeals recognizes *Inman* is factually distinct from the circumstances here. App. 10. In *Inman*, the evidence established the police could not secure a warrant within the time they needed to secure their evidence. 2 Wn. App.2d at 292. The police lacked reliable cell phone communication. *Id.* Under the circumstances, the police did not have the time to secure a warrant before a helicopter removed Mr. Inman from the scene. *Id.*

Unlike *Inman*, the evidence did not establish a warrant could not be secured under the circumstances of Ms. Adams' case. The police did not attempt to contact a prosecutor. RP 66. Had the officer found a prosecutor, he could have created the warrant in his car. RP 105. The fact that the officer did not try to get a warrant does not justify the warrantless search. It only establishes it was not convenient for the officer to secure one.

In making its decision in this case, the Court of Appeals disregarded its precedence when it found that time in securing a warrant two and a half hours after an accident did not justify a warrantless seizure. *City of Seattle v. Pearson*. 192 Wn. App. 802, 811, 369 P.3d 194 (2016). In *Pearson*, the Court of Appeals held that the availability of multiple officers allowed the police to attempt to secure a warrant far earlier than they tried. *Id.* at 816. This circumstance is like this case, where the officer in charge could obtain a warrant while the arresting officer remained with Ms. Adams. RP 69.

Additionally, the *Pearson* Court drew significant concern from the officers' decision not to seek a warrant while paramedics transported Mr. Pearson to the hospital. 192 Wn. App. at 815. Like *Pearson*, the police here took no actions to attempt to secure a warrant during Ms. Adams' transport, deciding before Ms. Adams was taken to the hospital that they would not try to get a warrant. RP 113. By accepting review, this Court can provide guidance and hold that the Court of Appeals made the correct decision in *Pearson* and that it should have applied the same analysis here. *See Pearson*, 192 Wn. App. at 816-17.

Rather than securing a warrant as required by the constitution, the officers chose expediency. RP 78. This Court should accept review to reject this analysis. Further, by granting review, this Court can resolve the conflict between *Pearson* and *Inman* and hold that only when exigent circumstances truly exist may the government invade the closely guarded protections established by the Fourth Amendment and Article I, Section 7. As such, Ms. Adams asks

this Court to accept review of the government's unlawful seizure of her bodily fluids.

2. This Court should review whether the trial court's decision not to sever unrelated charges deprived Ms. Adams of her right to a fair trial.

In its opinion, the Court of Appeals declined to review whether the trial court's decision to deny Ms. Adams' severance motion was an error because Ms. Adams' did not renew her motion at the close of the evidence. App. 12. Because of the unique circumstances of allowing the jury to hear evidence of a now void charge, this Court should accept review to determine whether this error deprived Ms. Adams of her right to a fair trial. RAP 2.5, RAP 13.4(b); *see also State v. Blake*, ___ Wn.2d ___, ___, 481 P.3d 521, 524 (2021).

As the Court of Appeals recognized, this Court recently held that possession of a controlled substance, as charged in Washington, is void because it did not include an intent element. App. 13 (citing *Blake*, 481 P.3d 521). Before trial, Ms. Adams moved to sever this charge from the vehicular homicide charge. This severance motion was necessary

because the drugs found in the car did not match the drugs found in her car. CP 10-11.

While it is true Ms. Adams did not renew her motion to sever at the close of the evidence, this should not be a barrier to review. *See* RAP 2.5(a). The rules governing severance are based on the fundamental concern that an accused person receive “a fair trial untainted by undue prejudice.” *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998); U.S. Const. amend. V, XIV; Const. art. I, § 3, § 22; CrR 4.4(b). A trial court must grant a motion to sever offenses if it determines that “severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). Despite CrR 4.4(b)’s restriction to the contrary, the circumstances of this case warrant review.

Severance of joined offenses should occur where prejudice results because the separate defenses embarrass or confound the accused, the use of evidence of one crime to infer a criminal disposition for the other charged crimes occurs, or where the jury may cumulate the evidence of the various

charged crimes and find guilt when, if considered separately, it would not so find. *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). A court errs where its lack of analysis and reliance on exceptions as “magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.” *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982) (citing *United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir. 1974)).

Especially because of the void nature of the criminal possession charge, this Court should review whether the trial court’s decision not to sever the controlled substance charge from the vehicular homicide charge deprived Ms. Adams of her right to a fair trial. This Court should find that the refusal to grant Ms. Adams’ severance motion increased the likelihood Ms. Adams would be convicted on her criminal disposition instead of the evidence of guilt. *Bythrow*, 114 Wn.2d at 718. The joint trial made it inevitable the jury would be impacted by the separate and distinct charges’ cumulative effect. *Id.*

At trial, the prosecutor's theory was that Ms. Adams committed the vehicular homicide by driving while influenced by a drug, but not the drug found to be in her possession. RP 476. The prosecutor's theory was that Ms. Adams was under the influence of methamphetamine, while the drug found in the car was heroin. *Id.* Neither prong of the vehicular homicide charge required proof Ms. Adams possessed the heroin, as it was not the drug found in Ms. Adams' system when she was driving. CP 10-11.

Evidence of the needles, the filled syringe, and the heroin found in the car were prejudicial. Many times, the witnesses testified about seeing the needles. RP 525, 648, 669, 677, 695, 721, 730. The prosecution raised it in its closing argument, including holding a photograph of it in its PowerPoint presentation. RP 1276, CP 50. These needles, the syringe, and the heroin were impossible to ignore. They made it impossible for the jury to render a verdict free of prejudice on either charge. *Bryant*, 89 Wn. App. at 865.

The cumulative evidence of allowing these charges to be heard together made it impossible for a jury to consider each charge's evidence separately. *See State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994). Each involved allegations of drug use, making the evidence highly prejudicial, especially the allegation that Ms. Adams' needles spilled out over the road when she crashed her car. *See, e.g., State v. Freeburg*, 105 Wn. App. 492, 501, 20 P.3d 984 (2001). Hearing the charges together made it impossible for the jury to ignore the evidence's propensity and cumulative effect. *United States v. Holloway*, 1 F.3d 307, 311 (5th Cir. 1993).

That this Court has found this charge unconstitutional makes the error greater. Not only was Ms. Adams prejudiced by evidence unrelated to the vehicular homicide, but she was charged with a crime the government did not have the authority to charge. *Blake*, 481 P.3d at 524. This Court continues to recognize the danger of allowing other act evidence to be used to determine the guilt of a person on a particular offense. *Saltarelli*, 98 Wn.2d at 363. Exclusion is

grounded on the principle that the accused must be tried for the crimes charged, not for uncharged crimes. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). Allowing the government to use the highly prejudicial and unrelated evidence of the hypodermic needles to prove the vehicular homicide charge deprived Ms. Adams of her right to a fair trial. *State v. Slocum*, 183 Wn. App. 438, 456, 333 P.3d 541 (2014). Under these circumstances, this Court should accept review to hold that the failure to renew her motion should not have deprived Ms. Adams of her right to a fair trial.

F. CONCLUSION

Based on the preceding, Ms. Adams asks this Court to grant review as allowed by RAP 13.4(b).

DATED this 7th day of April 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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APPENDIX

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Court of Appeals Opinion APP 1

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,)	No. 80277-1-I
)	
Respondent,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
SARAH ADAMS,)	
)	
Appellant.)	
_____)	

ANDRUS, A.C.J. — Sarah Adams appeals her jury conviction for vehicular homicide and possession of heroin. She challenges the trial court’s denial of her pretrial motions to suppress evidence and sever the charges. She also argues the trial court failed to properly instruct the jury on an essential element of the possession charge. We conclude that the trial court did not err in denying Adams’s motions to suppress evidence and to sever the charges. We reverse her conviction for possession of heroin based on State v. Blake, No. 96873-0, slip op. (Wash. Feb. 25, 2021), <https://www.courts.wa.gov/opinions/pdf/968730.pdf>.

FACTS

Sarah Adams was charged with vehicular homicide and possession of heroin after she struck and killed a motorcyclist, Jonathan Wiger, who was stopped at a traffic light on his way home from work at approximately 5:30 pm on June 19,

2017. As Wiger and several other motorists waited for the light to change at the intersection of 15th Street NW and State Route 167 in Auburn, Washington, Adams approached from behind traveling approximately 40 miles per hour. The weather was sunny and dry, yet Adams made no attempt to stop or slow down as she neared the intersection. Adams slammed into the rear of Wiger's motorcycle with her Subaru Outback and threw him forty-five feet into another vehicle. Wiger died at the scene shortly after the collision. His motorcycle also struck other vehicles waiting at the intersection, causing at least one other injury.

Adams's Subaru was severely damaged and came to rest on its side, trapping Adams inside and scattering used syringes and drug paraphernalia across the pavement. Responding firefighters broke out the rear window of her car to allow her to climb out, but refused to enter Adams's vehicle to extract her because of the presence of needles.

Police Officer Aaron Scrivo was dispatched to the scene at approximately 5:34 pm. He saw what appeared to be a very severe, multiple car accident involving a high-speed collision resulting in at least one fatality. The accident scene was a large intersection with at least four lanes of traffic, one turning lane, and highway entrance and exit ramps. One vehicle was on its side and multiple cars were strewn between lanes, some having rolled into others. He began assisting other officers talking to witnesses to determine what had happened.

Sergeant James Hopper, the supervisor on this scene, arrived at 5:47 pm. By the time he arrived, Adams was in an ambulance and being evaluated by emergency personnel. Sergeant Hopper began his investigation to determine the cause of the accident. He saw needles on the ground around the Subaru, one of

which was uncapped with a substance inside. He believed it may have been what drug users call “call loading,” where the user draws blood into a syringe and mixes it with heroin for injection at a later time. The syringe’s plunger was depressed and appeared to have been mostly used. He also observed a bottle of hydrocodone inside the Subaru.

In inspecting the accident site itself, Hopper found the Subaru’s front bumper caught between the motorcycle’s front and rear wheels and no evidence of any skid marks, suggesting the Subaru’s driver had not braked before impacting the motorcycle. By 6:18 pm, Sergeant Hopper believed he had probable cause to arrest Adams for committing vehicular homicide. He believed at that point that there was sufficient evidence to establish Adams was under the influence of heroin and caused the accident, leading to Wiger’s death.

Sergeant Hopper learned the paramedics were preparing to transport Adams to the hospital for medical treatment. He ordered Officer Scrivo to follow the ambulance to the hospital to place her under arrest and conduct a warrantless blood draw. Sergeant Hopper decided he needed to remain at the scene to ensure the scene was safe for police to work in, that traffic was under control, that everyone injured received appropriate medical care, and that sufficient investigative personnel were present to interview witnesses, collect evidence, and take photographs of the scene.

Officer Scrivo spoke to the paramedics before they left to confirm they would not give Adams anything intravenously while en route to the hospital. Officer Scrivo left the scene at the same time as the ambulance at 6:19 pm, and they both arrived at the hospital at 6:24 pm. He immediately placed her under arrest and

advised her of her legal rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Officer Scrivo overheard Adams complain of pain to the emergency room staff. Given the severity of the collision and the condition and location of Adams's car, he believed her complaints of pain to be reasonable. The treatment team was preparing to conduct their typical blood draws and, based on his experience, expected Adams to be ordered to undergo X rays and a CT scan. When Adams asked for some pain medication, he became concerned that this treatment would affect the evidentiary value of any blood. He ordered a blood draw without obtaining a search warrant because he did not believe he had the ability to delay her medical treatment to do so. The phlebotomist conducted the blood draw at 7:07 pm.

Sergeant Hopper testified he had authorized the warrantless blood draw in this case because of time and personnel constraints. First, he knew Adams was being taken by ambulance to a hospital for treatment. He believed, given the circumstances, it was highly likely that Adams's blood was "imminently" going to be altered by the medical providers and was concerned the introduction of saline or drugs into her blood would destroy evidence of vehicular homicide. Second, Sergeant Hopper also had personnel constraints. He was the supervisor on scene and he was occupied directing officers in controlling the scene and conducting the investigation. Officers on scene did not have laptops they could use to prepare a search warrant request and Sergeant Hopper would have had to leave the investigation scene to return to the police station to begin that process. Although he could have returned to the station to prepare a search warrant request,

Sergeant Hopper testified it would have taken him one to two hours to complete the paperwork, locate a prosecutor to review the search warrant, and then find a judicial officer to consider the request. He concluded he could not obtain a search warrant before Adams arrived at the hospital and began receiving treatment.

Officer Scrivo similarly testified that in the best case scenario, he could have obtained a search warrant for Adams's blood within 40 minutes to an hour. But because Adams was not in the physical shape to be arrested as in "a typical DUI arrest" and transported to a hospital for a blood draw after obtaining a search warrant, but was instead being transported to the hospital for medical treatment and going to start receiving help she needed immediately, he too felt he could not delay.

Adams's blood sample tested positive for high levels of methamphetamines. In the meantime, officers searching the scene found Adam's purse that had fallen out of her car when it flipped. Police subsequently obtained a search warrant for the purse and found a wallet, inside of which was a baggie containing a black substance, later confirmed to be 2.9 grams of black tar heroin.

The State charged Adams with vehicular homicide for operating a vehicle in a reckless manner in violation of RCW 46.61.520(1)(a), or operating a vehicle while under the influence of drugs in violation of RCW 46.61.520(1)(b), and causing Wiger's death. It also charged Adams with possession of heroin in violation of RCW 69.50.4013.

Adams moved to suppress the results of the blood draw. After hearing testimony from Sergeant Hopper, Officer Scrivo, and the phlebotomist, Marya Wargacki, the trial court denied this motion. The court found the State had proved

the warrantless blood draw was permissible under the exigency exception of the warrant requirement:

The scene of the collision was both confusing and chaotic. Someone was dead; Officers needed to ensure other people at the scene were safe, direct rush-hour traffic, secure the scene to preserve evidence, interview witnesses, and review physical evidence. Officers needed time to properly investigate. . . . Officers did not determine that she likely met the elements of vehicular homicide, that is: she was driving, caused the collision, and was likely either reckless or under the influence, until shortly before she left for the hospital at 6:19PM.

Once Adams was taken for treatment, Officers no longer had control over her. Further, they had no authority to order denial of treatment while they processed a warrant application. So, it was a legitimate concern that medical personnel may treat Adams with medication that would taint any evidentiary value of a blood draw.

Although with hindsight, it may have been possible for the Officer to obtain a warrant prior to the blood draw, this is not the standard for how we consider Officers' actions. The blood draw was completed by 7:07PM, roughly 1.5 hours from the call reporting the accident. Given the officers [sic] self-reported time of 1-2 hours, it may have technically been possible to secure a warrant prior to the blood draw. However, when looking at what officers knew at the time, it was reasonable that they determined an exigent blood draw was necessary. They did not determine probable cause to arrest until shortly before Adams was taken to the hospital at 6:19PM. The blood draw occurred within an hour of her being taken to the hospital. Additionally, this was delayed do [sic] to the difficulty of the blood draw. Given the severity of the case, the time required for the warrant, the natural dissipation of drugs in the blood, the fear that medication would destroy the evidentiary value of the blood, and the lack of control over Adams while she was in the care of medical providers, it was reasonable that Officers determined there was an exigency justifying a warrantless blood draw.

Adams also moved to sever the vehicular homicide charge from the heroin possession charge. The trial court denied this motion as well. Adams did not renew her severance motion at the close of evidence and did not object to any of the State's proposed jury instructions. The jury found Adams guilty of both charges and the trial court imposed a sentence of 114 months.

Adams appeals the warrantless blood draw, the failure to sever the two charges, and the sufficiency of the drug possession jury instructions.

ANALYSIS

A. Motion to Suppress

Adams argues the trial court erred when it denied her motion to suppress the results of her warrantless blood draw. We agree with the trial court that exigent circumstances justified the warrantless seizure under the circumstances the officers confronted in this case.

We review a trial court's legal conclusions on a motion to suppress evidence de novo. State v. Baird, 187 Wn.2d 210, 218, 386 P.3d 239 (2016). Whether exigent circumstances existed to justify a warrantless blood draw is a legal question we review de novo. City of Seattle v. Pearson, 192 Wn. App. 802, 811-12, 369 P.3d 194 (2016).

Generally, warrantless searches and seizures are presumed to violate the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Drawing a person's blood for drug or alcohol testing is a search triggering these constitutional protections. Pearson, 192 Wn. App. at 811. A warrantless search is permissible, however, if exigent circumstances exist. Baird, 187 Wn.2d at 218. The exigent circumstances exception to the warrant requirement applies where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010).

The natural dissipation of an intoxicating substance in a suspect's blood may be a factor in determining whether exigent circumstances exist, but courts must look to the totality of the circumstances on a case-by-case basis. Id. And we judge the situation "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Missouri v. McNeely, 569 U.S. 141, 158, n. 7, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (quoting Ryburn v. Huff, 565 U.S. 469, 477, 132 S. Ct. 987, 181 L. Ed. 2d 966 (2012)). The State bears the burden of demonstrating that exigent circumstances justified a warrantless search by clear and convincing evidence. Baird, 187 Wn.2d at 218; Pearson, 192 Wn. App. at 811.

Adams first contends the State failed to meet its burden of showing the existence of exigent circumstances because no medical personnel informed the police that they intended to introduce any medicine or fluids into her bloodstream before the draw. But even without such direct evidence, the totality of the circumstances supports the conclusion that there was a significant likelihood that Adams's blood chemistry would be altered by medical treatment and a significant risk that evidence of her drug use at the time of the accident would be compromised.

First, Adams had been in a serious car accident in which her car flipped up onto its side. She was evaluated by paramedics at the scene and they determined she needed to be taken to the hospital for treatment. Second, when she arrived at the hospital, she complained of pain and requested pain medication. The testifying officers stated their experience in similar situations led them to believe she would receive some type of opiate for pain. Sergeant Hopper believed there

was evidence that Adams had used heroin, an opiate. He was reasonably concerned that administering an opiate to Adams in the hospital would affect law enforcement's ability to determine the level of opiates in her system before receiving such pain medications.

Third, neither Sergeant Hopper nor Officer Scrivo felt it would be appropriate for law enforcement to interfere with Adams's emergency medical treatment. This decision, viewed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," was a rational one here. As the trial court pointed out, the officers had no control over the treatment physicians might deem necessary for Adams or the authority to order the treatment providers to delay treatment to allow them to obtain a warrant. Their conclusion that evidence would be destroyed if they did not immediately conduct a blood draw appeared factually well founded, whether or not hospital staff informed the officers that Adams needed imminent medical treatment that would alter her blood chemistry.

Adams next contends the State did not meet its burden of proof because, by the officers' own estimate, there was enough time between when they arrived at the scene and when the blood draw occurred to secure a warrant. On this basis, Adams seeks to distinguish this case from Division Two's decision in State v. Inman, 2 Wn. App. 2d 281, 409 P.3d 1138 (2018). In Inman, two people were injured in a motorcycle accident on a rural road. Inman, the driver of the motorcycle, had been briefly knocked unconscious and had sustained serious injuries to his face. Id. at 284. When police arrived, Inman admitted that he had been drinking before the accident. Id. at 285. Because a helicopter was coming

to medevac Inman and the accident occurred in a rural area without reliable cell phone coverage, the responding officers concluded that they did not have the estimated forty-five minutes to obtain a warrant for a blood draw. Id. Division Two concluded that exigent circumstances supported the warrantless blood draw in that case. Id. at 293.

Adams correctly points out that Inman is distinguishable from the present case, the primary difference being the police in Inman lacked reliable cell coverage to contact a prosecutor in the time before he was flown to a hospital. But the similarities between Inman and this case are more significant than the differences. Both defendants were injured in the accident. Id. at 292. Both required and received emergency medical treatment. And in both cases, the police officers could not obtain a search warrant before the defendants were removed from law enforcement's control by those providing that care. Finally, both cases involved the risk that the medical treatment could impact the evidentiary value of the blood sample. Id. at 292.

Adams asks this court to overturn her conviction based on Pearson. But Pearson is not controlling here. In that case, Pearson, who pulled over and called police after she struck a pedestrian with her car, was subjected to a warrantless blood draw and then charged with driving under the influence after her blood sample tested positive for THC. Id. at 807-809. This court held the City had not met its burden of demonstrating exigent circumstances existed because the only justification for failing to obtain a warrant was the concern that the passage of time would lead to the natural dissipation of THC in Pearson's bloodstream. Id. at 816.

The City failed to present any evidence indicating why they did not obtain a warrant. Id. at 815.

Here, on the other hand, the State's offered justification for the warrantless blood draw goes well beyond the concern that intoxicants in Adams's bloodstream would naturally dissipate while they sought a search warrant. Pearson was uninjured while Adams needed emergency medical care. Police officers put Pearson through field sobriety tests at the scene. Id. at 807-08. Officers could not undertake such tests in this case. The Pearson case did not involve a deceased victim in the middle of a busy intersection at rush hour, with multiple damaged vehicles and at least one other injured victim. Pearson did not need to be transported to the hospital via ambulance, whereas Adams did. The most crucial distinction was the reasonable probability that Adams's medical care would imminently alter the composition of her blood, thus destroying evidence.

Adams argues that the warrantless blood draw took place forty minutes after the police established probable cause, reasonably within the estimated time frame it would have taken law enforcement to obtain a warrant. But the trial court correctly concluded this argument ignores the situation these officers confronted by this chaotic and confusing crime scene and the unknowns regarding Adams's physical condition. Sergeant Hopper testified he lacked both the time and the personnel to address every issue simultaneously and, with medical treatment imminent, he did not have the time or the ability to obtain a search warrant without having to force Adams to delay what may have been necessary medical treatment. These situational restraints, in addition to the lingering risk that Adams's medical

treatment would contaminate the evidence provided by her blood sample, made it impractical for the officers to obtain a warrant for a blood draw.

We conclude the State established the existence of exigent circumstances by clear and convincing evidence.

B. Motion to Sever Charges

Adams next argues the trial court erred when it denied her motion to sever the vehicular homicide charge from the possession of a controlled substance charge. Adams failed to preserve this issue for appeal.

We review a trial court's denial of a motion to sever charges for abuse of discretion. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). Severance is governed by CrR 4.4, which provides in part,

[t]he court, on application of the prosecuting attorney, or on application of the defendant pursuant to subsection (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

CrR 4.4(b). Subsection (a) provides that

[a] defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. . . . If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(Emphasis added).

In this case, Adams moved for severance before trial but failed to renew the motion at the close of the evidence. She therefore waived severance and the issue

is not before us on appeal. State v. Bluford, 188 Wn.2d 298, 306, 393 P.3d 1219 (2017).

C. Possession of Controlled Substance Jury Instruction

Finally, Adams argues the trial court erred by failing to instruct the jury that the crime of possession of a controlled substance includes an element of knowledge. She contends RCW 69.50.4013(1), the possession statute, must either be interpreted to require knowledge or be declared unconstitutional. In light of the Supreme Court's recent decision in State v. Blake, No. 96873-0, slip op. (Wash. Feb. 25, 2021), <https://www.courts.wa.gov/opinions/pdf/968730.pdf>, we agree.

The State first contends that Adams is precluded from raising this issue for the first time on appeal under the invited error doctrine because she did not object to the to convict instructions at trial. This argument lacks merit.

Under the invited error doctrine, a defendant may not challenge for the first time on appeal, jury instructions which she proposed. State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). However, the doctrine does not preclude defendants from challenging on appeal jury instructions the defendant did not propose. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). The State offers no authority for its contention that a defendant's failure to object to jury instructions proposed by the prosecution constitutes invited error. The doctrine therefore does not preclude Adams from raising the issue here.

The State argues that possession of a controlled substance is a strict liability crime and that the lack of a mens rea does not render RCW 69.50.4013(1) unconstitutional, citing State v. Bradshaw, 152 Wn.2d 528, 539-40, 98 P.3d 1190

(2004), and State v. Cleppe, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). But the Supreme Court's majority opinion in Blake indicates the constitutional issue was not addressed on its merits in either Bradshaw or Cleppe. Blake, slip op. at 6, n. 4. It went on to hold that the absence of a mens rea element in RCW 69.50.4013(1) for the crime of possession of a controlled substance violates due process and renders the statute void. Blake, slip op. at 31. Because the statute is void, we vacate Adams's conviction for possession of a controlled substance.

Affirmed in part; reversed in part.

Andrus, A.C.J.

WE CONCUR:

Mann, C.J.

Chun, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80277-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: April 7, 2021

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