

No. 41098-2

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

BARBARA H. QUINTANA

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay

No. 09-1-00485-4

BRIEF OF RESPONDENT

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A. STATE'S COUNTERSTATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. When the trial attorneys approached the bench to inform the judge of their peremptory strikes, was Ms. Quintana denied the right to be present during jury selection?
2. Initially, Quintana was believed to be the victim, rather than the driver, involved in a collision that resulted in the vehicular assault charge at issue in this case. While investigating the collision, a police detective entered the emergency room where Quintana was being treated for injuries sustained in the collision, and after a doctor exposed Quintana's bare chest by removing a blanket from her torso, the detective took a photograph that evidenced bruising alleged to have been caused by impact with the steering wheel of the car. Did the trial court err by admitting this photograph into evidence?
3. Was the evidence at trial sufficient to prove that Quintana was the driver of the car?
4. Because Quintana was not immediately identified as the driver in this case, there was no forensic blood draw; therefore, there was no per se evidence of driving under the influence. However, the State obtained the results of a hospital blood draw and alcohol analysis, and this evidence was introduced at trial to prove that Quintana was under the influence of or affected by alcohol at the time of driving. Did the trial court err by allowing the hospital alcohol analysis to be introduced at trial when the jury was only asked to decide the affected-by prong of impaired driving to the exclusion of the per se prong?
5. Where the alcohol test results of a non-forensic, hospital blood test is offered for the limited purpose of proving the affected-by prong of impaired driving, must the testing method used by the hospital nevertheless strictly comply with the statutory requirements of a forensic blood test offered to prove the per se prong of impaired driving even though the per se prong is not submitted to the jury?
6. Was the hospital blood evidence in this case inadmissible hearsay?

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7. Was there sufficient evidence at trial to prove that Quintana drove in a reckless manner?
8. Was the evidence at trial, in the totality, sufficient to sustain the conviction?
9. Did Quintana receive ineffective assistance of counsel?
10. Was the jury correctly instructed in this case?

B. STATEMENT OF THE CASE

On August 23, 2009, Barbara Quintana drove at speeds of between 80 and 110 miles per hour, at one point driving through a 35 mile-per-hour speed zone. RP 113, 117-218, 129-131, 214-215. When officers took pursuit, Quintana drove erratically down a side road to Highway 101, where she ran through a stop sign without stopping, and popped out onto the highway with cars coming in both directions. RP 215. She had two passengers in the car with her. Dion Obi was in the front passenger seat, and David Wahwassuck was in the rear passenger seat. 139-144. Quintana's dangerous driving came to an abrupt halt when she tried to make a left turn at speeds of up to 40 miles per hour but was unable to control the car and drove it into a pole. RP 192, 195, 197-200, 216. The collision caused a broken leg to Mr. Wahwassuck, whose injuries required surgery. RP 213-217, 348. Infection caused Mr. Wahwassuck to lose his leg. 213-217.

Alcohol containers were found at the scene of the collision, and the car smelled strongly of alcohol. RP 123, 127, 169, 218. Initially, Dion Obi was arrested because he

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was believed to be the driver when the collision occurred and when the car passed tribal officers at a high rate of speed immediately before the collision. RP 169-171. Quintana was transported to the hospital for emergency treatment. At least one of the police officers who investigated the accident scene began to question whether Obi was truly the driver. A pair of women's shoes was found in front of the driver's seat in the car (RP 170, 242), and medics reported that Quintana had bruising on her chest that looked like an injury from impact with the steering wheel. RP 177-178, 249-250.

Quintana was not under arrest, and no forensic blood draw was requested or taken from her. RP 62-65. An officer appeared at the hospital to investigate the crime for which Obi had been arrested. An officer asked Quintana to sign a waiver for her medical records, which she consented to do. RP 22-25, 35-37. Hospital staff took a sample of Quintana's blood and analyzed it to determine whether their observations of her were explained by alcohol impairment rather than injuries, or vice versa. RP 282. An officer appeared in the emergency room and asked a doctor whether Quintana had bruising on her chest. The doctor removed a blanket that was covering Quintana's bare chest, at which time the officer took a photograph of the bruising that was present on Quintana's chest. RP 159-160.

DNA samples were obtained from Quintana and from Obi. RP 323-333. Blood evidence was collected from the inside of the car as well as from a crushed spot in the windshield. Accident reconstruction determined that the crushed windshield was caused by the front-seat passenger hitting the windshield. RP 197, 229. Blood splatter on the

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steering wheel was determined to have been deposited by the driver. RP 245, 319-321. The DNA on the windshield matched Obi. RP 332-333. The DNA on the steering wheel matched Quintana. RP 332.

Mr. Obi was released from custody. Quintana was charged with vehicular assault.

Blood analysis test results obtained from the hospital showed that Quintana's blood alcohol content was at 0.26 grams per one-hundred milliliters at the time of driving as determined by the hospital blood serum test. RP 292. At the time of trial, the trial judge ruled that Quintana's medical record waiver was invalid and that medical records were inadmissible, with the exception of the hospital blood test results. RP 62-74.

The first amended information charged Quintana with vehicular assault under the alternative prongs of reckless driving, driving with a blood alcohol level of 0.08 or higher within two hours of driving, or driving while under the influence of or affected by intoxicating liquor or any drug, or while under the combined influence of intoxicating liquor and any drug. (CP 84-85). Only the prong of reckless driving and the prong of driving while under the influence of or affected by alcohol were submitted to the jury. RP 431-444.

Other facts relevant to Quintana's issues on appeal are located in the relevant subsections below, as needed for clarity, in consideration of the number of issues briefed.

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C. ARGUMENT

1. When the trial attorneys approached the bench to inform the judge of their peremptory strikes, was Ms. Quintana denied the right to be present during jury selection?

Criminal defendants have a right to be present at all critical stages of the prosecution, which includes the right to be present during jury selection and the exercise of challenges for cause. *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). Specifically, a “defendant ‘has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges.’” *Id.* at 883, quoting *Commonwealth v. Owens*, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993) (further citations omitted).

“Where... personal presence is necessary in point of law, the record must show the fact.” *Irby*, 170 Wn.2d at 884, quoting *Lewis v. United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). However, “[a] party seeking review has the burden of perfecting the record so that the court has before it all evidence relevant to the issue on appeal.” *State ex rel. Dean v. Dean*, 56 Wn. App. 377, 382, 783 P.2d 1099 (1989)(citing RAP 9.2(b)). Cases on appeal should be decided only on the facts contained in the record. *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989). And the reviewing court should “not speculate upon the existence of facts that do not appear in the record.” *State v. Blight*, 89 Wn.2d 38, 46, 569 P.2d 690 (1996). Even where a party alleges a manifest error affecting a constitutional right, the appellate court should not review an issue raised

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for the first time on appeal if the record is insufficient to support the claim. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). “[W]here the facts necessary for its adjudication are not in the record... the error is not ‘manifest.’” *Id.* at 31.

The record in *Irby* showed that the defendant was in jail, and therefore not present, when the trial judge contacted the defense attorneys by email and asked that some of the jurors be struck for cause, to which the defense attorneys agreed, by email, approximately 51 minutes later. *Irby* at 884. The *Irby* court reasoned that “it is unlikely that the attorneys spoke to Irby about the email in the interim.” *Irby* at 884. On these facts, the *Irby* court wrote:

Significantly, the record here does not evidence the fact that defense counsel spoke to Irby before responding to the trial judge’s email. In sum, conducting jury selection in Irby’s absence was a violation of his right under the due process clause of the Fourteenth Amendment to the United States Constitution to be present at this critical stage of the trial.

Irby, 170 Wn.2d at 884.

In the instant case, Quintana was present for the entire *voir dire* and discussion with jurors. RP 102. The attorneys asked to approach the bench to name their peremptory strikes rather than to announce their strikes to the jury. RP 103-107. On appeal, Quintana’s attorney asserts that “[t]he record *does not suggest* [emphasis added] that Quintana was included in the sidebar or that she had any opportunity to contribute to her lawyer’s selection decisions....” and that “[o]n this record *it appears* [emphasis

added] Ms. Quintana was *in no way* [emphasis added] privy to the peremptory challenge process.” (Appellant’s Brief at 10).

The State asserts that Quintana was present for the entire jury selection process. RP 102-107. Whether Quintana accompanied her attorney to the bench to name each peremptory strike as it occurred is not reflected in the record, and for the sake of argument it is assumed that she remained seated at the defense table when her attorney approached the bench and named each of Quintana’s peremptory strikes in due order. However, Quintana was in the courtroom for the entire *examination* of the jury panel and was in a position, and had ample *opportunity*, to aid her counsel in the selection process. RP 102-107. Defendants in jury trials have many rights, and many of these rights give rise to strategic or tactical considerations that go to the very core of the benefit of representation by professional counsel. Consider, for example, the right to testify or not testify. Should defense counsel and their clients openly discuss the decision whether to testify so as to demonstrate for the record that the defendant had an opportunity to participate in the decision making? Or should the trial court judge openly interrogate the defense counsel and defendant in regard to each private communication so as to establish for the record whether the defendant had an opportunity to participate?

In *Irby* it was manifest from the record that Irby was not present at, and was not privy to, the communications between the trial judge and the defendant’s attorneys when strikes for cause (not peremptory strikes) were discussed and decided. *State v. Irby*, 170 Wn.2d 874, 884, 246 P.3d 796 (2011). In the instant case, however, it is manifest from

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the record that Quintana was present in the courtroom and was privy to the examination of the jury panel and had opportunity to participate in selecting peremptory strikes prior to her attorney approaching the bench to perform the ministerial task of identifying the peremptory strikes in due order.

Quintana did not raise this objection below. No citation to the record has been provided wherein it is manifest that Quintana was denied the opportunity to participate in the selection of peremptory strikes. Thus, the error alleged is not “manifest,” and the court should not consider this issue for the first time on appeal on this record. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Additionally, Quintana had no right to be present at the bench for the ministerial matter of naming or identifying for the court the jurors who had been selected for peremptory challenge. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 483-484, 965 P.3d 593 (1998).

To be raised for the first time on appeal, the error must be “manifest.” RAP 2.5(a)(3). “[M]anifest’ means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. ‘Affecting’ means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient.” *State v. Lynn*, 67 Wn. App. 339, 245, 835 P.2d 251, 255 (1992) (footnote omitted).

Quintana cites to the record only for argumentative suggestions and appearances but does not offer facts or evidence.

2. Initially, Quintana was believed to be the victim, rather than the driver, involved in a collision that resulted in the vehicular assault charge at issue in this case. While investigating the collision, a police detective entered the emergency room where Quintana was being treated for injuries sustained in the collision, and after a doctor exposed Quintana's bare chest by removing a blanket from her torso, the detective took a photograph that evidenced bruising alleged to have been caused by impact with the steering wheel of the car. Did the trial court err by admitting this photograph into evidence?

During the investigation that immediately followed the car wreck that led to the charge of vehicular assault in this case, investigators believed that Quintana was a passenger in the vehicle rather than the driver. RP 169-171.

Sergeant George went to the hospital emergency room and took a picture of Quintana that depicted her "bare chest and injuries that are visible on her chest – below her chest." RP 249. Sergeant George testified that Quintana's injuries were consistent with her having impacted the steering wheel during the collision. RP 250

The trial court judge described the photograph, as follows: "And I'll just make a record: this is a – it's a photograph where she is naked from the chest up, it does show her breasts and, so, I would assume that would be part of the issue here." RP 156. The trial judge summarized the facts as an offer of proof, as follows:

"Detective George came into her room and took the – it looks like it's – she didn't even have a shirt on at this point. This photograph looks to me as if she had just a – it looks like a blanket and a – a yellow safety blanket – over her. It looks like that's been pulled down. So, it doesn't look like she was actually dressed at this time.

RP 159.

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The prosecutor supplemented the record, as an offer of proof, as follows:
“Detective George requested the doctor move it and the doctor gave him – Detective George took a picture – Sergeant George took a picture. That’s how it happened.” RP 160.

Quintana’s trial attorney, arguing against admission of the photograph, asked to make a “brief record” and offered that “[a]ccording to Detective George’s report... Trooper Merritt advised he was told by the fire personnel that Ms. Quintana had bruising across the front of her chest just below her breast line.” RP 177-178. This information is, apparently, what motivated Sergeant George to seek a photograph.

It follows from the offers of proof and from evidence in the case that fire personnel, the doctor, and other medical staff in the hospital were all in a position to legitimately see what they saw in regard to bruising to Quintana’s chest and could have been called to testify about the bruising to Quintana’s chest. Thus, the photograph, which was non-testimonial in nature, did not lead to the discovery or seizure of evidence that was unavailable or unknown to the investigators, but was instead a reduction of eye-witness accounts to a tangible form, a photograph.

No Washington case was located that is directly on point, however a federal court has ruled that a defendant does not have a reasonable expectation of privacy in his hospital room because hospital personnel can enter the room at any time, and that, therefore, police who entered a defendant’s hospital room to search for drugs in his bedpans did not violate his rights. *U.S. v. George*, 987 F.2d 1428, 1432 (C.A.9

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(Wash.),1993). The court reasoned that “[e]ven if we assume that George had a subjective expectation of privacy in his hospital room, that expectation was not objectively reasonable.” *Id.* at 1432. One distinction is that in *George*, the defendant was already under arrest when police searched his hospital room. *Id.* at 1432. However, the search was upheld because any of the hospital personnel could have made the same discovery and because there was probable cause to believe that his bedpans contained drugs. *Id.* at 1432.

In the instant case, based upon information from fire personnel, there was probable cause to believe that Quintana had bruising to the chest, and the fire personnel, the hospital staff, and the doctor were all in a legitimate position to observe the same bruising; thus, Quintana did not have a reasonable expectation of privacy in the emergency room in regard to the bruising when it was exposed, due to the emergency situation, to many observers. *Id.* at 1432. See also, *State v. Smith*, 88 Wn.2d 127, 140, 559 P.2d 970, 976 (1977)(patient had no reasonable expectation of privacy in his clothes that were stored in a closet in an area that was used by doctors, nurses and other hospital staff); *U.S. v. Wade*, 388 U.S. 218, 222, 87 S. Ct. 1926, 1930, 18 L. Ed. 2d 1149 (1967) (compelling accused to exhibit his person or submit to a blood test is not testimonial).

If it was error for the court to admit the photograph, the error was harmless beyond a reasonable doubt. “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the

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same result in the absence of the error.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182, 1191 (1985). Applying harmless error analysis, the *Guloy* court wrote that “[u]nder the ‘overwhelming untainted evidence’ test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *Id.* at 426. In the instant case, the photograph was offered only as additional proof that Quintana was driving, but irrespective of the photograph, the other overwhelming untainted evidence in the case, consisting of DNA, the laws of physics, eye witness testimony, and other evidence as described and discussed elsewhere throughout this brief and the record on review, necessarily leads to a finding that Quintana was driving and to a finding of guilt.

3. Was the evidence at trial sufficient to prove that Quintana was the driver of the car?

An appellate court is not entitled to weigh either the evidence or the credibility of witnesses even though the reviewing court may disagree with the trial court; this is because the trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. *In re Welfare of Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The appellate court is required to view the

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evidence in the light most favorable to the State and to grant deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992).

Mr. Wahwassuck, who was a passenger in the back seat of the car and was injured in the collision, testified that Quintana is the one who drove the car at excessive speeds, drove through a stop sign without stopping, and was driving the car when it crashed. RP 213-216.

The occupants of the car included two males (Mr. Wahwassuck and Mr. Obi) and one female (Ms. Quintana). 139-144. A pair of lady's shoes were found in front of the driver's seat. RP 170, 242.

When the car crashed, the car impacted head-on with a utility pole. RP 195. Due to the direction of the crash and impact, application of the law of physics proved to a certainty that objects in the car, including human beings, traveled straight forward. RP 195-197. Physical evidence showed that the person in the passenger seat struck the windshield, causing it to crush. RP 197, 229. Hair was found in the crushed windshield. RP 232-233, 243. Mr. Obi had injuries that were consistent with having impacted the windshield. RP 248-249. Blood splatter was found and collected throughout the car. RP 230, 243-247. Blood was found on the steering wheel. RP 245.

Sergeant George took DNA samples from Quintana. RP 237-238. Detective Killeen took hair samples for analysis from Mr. Obi. RP 303.

Kari O'Neill, a forensic scientist with the Washington State Patrol Crime Laboratory, testified in regard to DNA, blood splatter analysis, and other matters. RP

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308-343. Ms. O’Neill testified that she determined the DNA profiles of Mr. Obi and Quintana and compared those to evidence recovered from the collision. RP 324. Blood splatter analysis indicated that blood evidence obtained from the steering wheel came from the driver of the car. RP 319-321. Ms. O’Neill determined that blood from the steering wheel was Quintana’s blood. RP 332. Based upon her analysis, she determined that the “probability of selecting an unrelated individual at random from the U.S. population with a matching profile is one in nine-point-nine quadrillion.” RP 332. Ms. O’Neill determined that DNA from the break in the windshield matched Mr. Obi and that the “estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is one in eighty-five trillion.” RP 332-333.

4. Because Quintana was not immediately identified as the driver in this case, there was no forensic blood draw; therefore, there was no per se evidence of driving under the influence. However, the State obtained the results of a hospital blood draw and alcohol analysis, and this evidence was introduced at trial to prove that Quintana was under the influence of or affected by alcohol at the time of driving. Did the trial court err by allowing the hospital alcohol analysis to be introduced at trial when the jury was only asked to decide the affected-by prong of impaired driving to the exclusion of the per se prong?

Quintana asserts that the hospital blood analysis was not admissible for any purpose because it did not comply with the statutory requirements for a forensic blood draw offered as proof of a per se violation as defined by RCW 46.61.502(1)(a). These statutory requirements are found at RCW 46.61.506 and RCW 46.20.308. The State does

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not dispute that there was not a forensic blood draw or blood analysis performed in this case that would be admissible under these statutory requirements. However, as argued elsewhere in this brief in response to Quintana's similar issues on appeal, the State did not offer the hospital blood draw as a forensic blood draw, and the question of whether or not Quintana's blood alcohol content was at or above 0.08 within two hours of driving was not submitted to the jury. CP 67, 69, 73; RP 436-438. Instead, only the question of whether Quintana was under the influence of or affected by alcohol, such that her ability to drive was affected to an appreciable degree by the consumption of alcohol at the time of driving, was submitted to the jury. (See, e.g., the State's briefing in Sections 5 and 6 of the State's brief).

The jury was instructed in Instruction No. 7 as follows:

A person commits the crime of vehicular assault when he or she operates or drives any vehicle in a reckless manner or while under the influence of intoxicating liquor, and proximately causes substantial bodily harm to another.

CP 67, RP 436.

At Instruction No. 9, the jury was instructed that:

A person is under the influence or affected by the use of intoxicating liquor when the person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of intoxicating liquor.

CP 69, RP 436.

At Instruction No. 13, the jury was instructed in regard to the elements of the offense of vehicular assault, and in regard to the impairment-element of the offense the

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jury was instructed only in regard to the affected-by prong, with no reference to the per se prong. CP 73, RP 437-438.

Thus, Quintana's analysis and discussion of forensic blood draws under RCW 46.61.502, RCW 46.61.506, and RCW 46.20.308 have no application to the facts of the instant case.

The police did not seize Quintana and did not compel her to provide a blood sample. Instead, Quintana's blood was obtained and analyzed not due to police action but instead because she was transported to a hospital emergency room where she received emergency treatment administered by civilians. From this action, her blood and its alcohol content became exposed to the view of others, potentially including doctors, nurses, and other hospital staff. Under these circumstances Quintana cannot be found to have an actual expectation of privacy other than that provided by a medical-record or doctor-patient privilege, but the medical or doctor-patient privilege does not apply to this blood test. *State v. Smith*, 84 Wn. App. 813, 929 P.2d 1191 (1997). It was not until after the blood was obtained and analyzed by civilians for civilian purposes, and was not until after the results were made known and exposed to others for medical and hospital administration reasons, that the evidentiary value of the blood in a criminal case was confirmed by police. Thus, Quintana had no reasonable expectation of privacy in the blood test results. See, e.g., *State v. Carter*, 151 Wn.2d 118, 85 P.3d 887 (2004); see also, *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722 (search lawful where boxes kept on property not owned by defendant because he could not expect to keep people from

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looking inside them when they discovered them), *cert. denied*, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986).

The alcohol contents of Quintana's blood serum was not in her control and was placed within the stream of communications in the hospital, and once there, the results were exposed to the view and knowledge of potentially many people, including technicians, clerical workers, doctors, and any number of others, none of whom were agents of the state. *State v. Smith*, 88 Wn.2d 127, 140, 559 P.2d 970, 976 (1977). Because the medical or doctor-patient privilege does not apply, Quintana had no other reasonable expectation of privacy. *State v. Smith*, 84 Wn. App. 813, 818-19, 929 P.2d 1191 (1997). The court admitted Quintana's blood as a medical waiver. RP 72-73.

5. Where the alcohol test results of a non-forensic, hospital blood test is offered for the limited purpose of proving the affected-by prong of impaired driving, must the testing method used by the hospital nevertheless strictly comply with the statutory requirements of a forensic blood test offered to prove the per se prong of impaired driving even though the per se prong is not submitted to the jury?

Maria Rigolo drew a sample of Quintana's blood while Quintana was at Mason General Hospital after the collision. RP 263. Maria Rigolo is qualified to draw blood. RP 263-265. Lisa Jacobson tested the blood sample and determined the alcohol content of Quintana's blood. RP 277-278. Lisa Jacobson is qualified to perform blood analyses in a hospital setting. RP 272-278.

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“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... any technician trained in withdrawing blood.” RCW 46.61.506(5). As the record demonstrates, Maria Rigolo is trained in withdrawing blood. RP 263-265. However, no blood test was administered under the provisions of RCW 46.20.308 in regard to Quintana in this case, so the requirements of RCW 46.61.506 do not apply.

Furthermore:

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.

RCW 46.61.506(3). There is no reference to the record to indicate that Lisa Jacobson has the required permit to conduct a forensic blood analysis, nor is there a citation to the record to indicate that the blood analysis in this case was performed according to the standards approved by the state toxicologist for forensic blood draws. But there also was no forensic blood draw in this case; so, RCW 46.61.506 and RCW 46.20.308 do not apply to the facts of this case.

When Quintana’s blood draw occurred, she was not under arrest (because she was still thought to be a victim in the case). The implied consent statute, RCW 46.20.308, is not applicable because it does not control the admissibility of blood alcohol evidence

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taken by a physician from an individual not under arrest. *State v. Smith*, 84 Wn. App. 813, 818–19, 929 P.2d 1191 (1997).

The serum or medical blood draw occurred prior to Quintana’s arrest; thus, the implied consent statute, RCW 46.20.308, is not applicable because it does not control the admissibility of blood alcohol evidence taken by a physician from an individual not under arrest. *State v. Smith*, 84 Wn.App. 813, 818–19, 929 P.2d 1191 (1997).

Nevertheless, such evidence may be seized in accordance with general search and seizure law and may be admitted at trial. *Id.* at 819–20. Such is the case here.

The court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). ER 803(a)(6) provides that records of regularly conducted activity are not inadmissible as hearsay. The rule references chapter 5.45 RCW, which is the uniform business records as evidence act (UBRA). RCW 5.45.020 provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian *or other qualified witness* testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

(Emphasis added.)

The serum, or hospital blood analysis, is admissible as a medical and hospital record under ER 803(a)(6):

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The courts tend to allow the admission of medical records maintained by a physician, even though the records consist partly of laboratory reports and other information supplied by persons who are not part of the physician's business. The courts have emphasized the likelihood that the records are trustworthy. *See, e.g., State v. Sellers*, 39 Wn. App. 799, 695 P.2d 1014 (1985).

5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON EVIDENCE, ch. 5, at 436, cmt. (6) (2010–2011).

In *Tennant v. Roys*, 44 Wn. App. 305, 312, 722 P.2d 848 (1986), the court held that medical blood alcohol tests are admissible as a business record under RCW 5.45.020.

Still more, Quintana's assertion that the hospital's serum blood test is inadmissible because it was not obtained and analyzed in accordance with forensic blood draws is directly contradicted by *State v. Donahue*, 105 Wn. App. 67, 72-77, 18 P.3d 608 (2001).

Further argument on this issue is provided in Sections 4 and 6 of the State's brief.

6. Was the hospital blood evidence in this case inadmissible hearsay?

Maria Rigolo drew a sample of Quintana's blood while Quintana was at Mason General Hospital after the collision. RP 263. Lisa Jacobson tested Quintana's blood sample and testified that the results were, as expressed in grams, "point-two-six-one." RP 278. Quintana has not cited to any part of the record where a hearsay objection was raised below, and she now raises this issue for the first time on appeal.

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A hearsay objection not raised in the trial court is not subject to review for the first time on appeal. *State v. Sims*, 77 Wn. App. 236, 890 P.2d 521 (1995) (citing ER 103(a)(1); RAP 2.5(a); *Walker v State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993); *State v. Wicke*, 91 Wn.2d 638, 642-43, 591 P.2d 452 (1979)).

The blood test results were admitted without hearsay objection, and were nonetheless excepted from the hearsay rule by ER 803(a)(5).

Dr. Hautala reviewed the blood test results provided by Lisa Jacobson. He explained that knowing the alcohol content to assess the patient's condition is important because "it affects how they're acting, whether or not they're [sic] abnormal behavior is due to a head injury versus other intoxicating substances. So, it helps us piece together whether or not they're acting goofy from an injury versus other things." RP 282. Dr. Hautala explained that Quintana's hospital blood test results showed that the alcohol content of her blood was "two-hundred-sixty-one-point-eight milligrams per deciliter [261.8 mg/dl]." RP 283. Lisa Jacobson's report and the blood test results were properly admitted into evidence, as was the testimony of Dr. Hautala. *State v. Sellers*, 39 Wn. App. 799, 807, 695 P.2d 1014, 1019 (1985).

Brian Capron, a forensic toxicologist with the Washington State Toxicology Laboratory, testified about the effects of alcohol on the human body. RP 284-294. Mr. Capron converted Quintana's hospital blood test result of 261.8 mg/dl to a measurement that is reported in grams per one hundred milliliters. RP 292. The result was that Quintana's blood alcohol content was 0.261 grams per one-hundred milliliters. RP 292,

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294. Mr. Capron testified that “research indicates that an oh-eight [0.08], regardless of your tolerance, that you’re at the point where you’re not safe to drive.” RP 288. A review of the entire testimony reveals that Quintana had three times more alcohol in her blood than what is scientifically shown to impair driving.

Mr. Capron described alcohol impairment as a central nervous system depressant that affects vision, cognitive abilities, motor functions, glare recovery, tunnel vision, reaction times, and skills and abilities needed to operate a motor vehicle, such as divided attention abilities. RP 286-288.

The offense of vehicular assault is committed when one drives while under the influence as defined by RCW 46.61.502 and causes substantial bodily harm to another. RCW 46.61.522. “Under the influence” as defined by RCW 46.61.502 can be the per se limit of 0.08 as determined by a statutory blood or breath test under RCW 46.61.502(1)(a), but is also defined, as an alternative, as “under the influence of or affected by intoxicating liquor” under RCW 46.61.502(1)(b). In the context of RCW 46.61.502(1)(b), under the influence or affected by intoxicating liquor is defined as when “the ability to drive is lessened in any appreciable degree by the consumption of intoxicants.” *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105, 108 (1995).

The evidence in the record on review shows beyond a reasonable doubt that Quintana’s ability to operate a motor vehicle was lessened to an appreciable degree by the consumption of alcohol at the time of driving.

Further relevant argument is provided in Sections 4 and 5 of the State’s brief.

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7. Was there sufficient evidence at trial to prove that Quintana drove in a reckless manner?

Mr. Wahwassuck, who was a passenger in the car, testified that Quintana drove the car erratically and at “seventy-plus,” and that Quintana drove “seventy, seventy-five” on Reservation Road. RP 214, 215. She drove past two officers who were in a parking lot, who then took up pursuit. RP 215. Quintana drove down the road to where she “hit the highway, didn’t even stop at the stop sign, just jumped right out on the highway, cars coming both ways.” RP 215.

One of the two officers who were in the parking lot and saw the driving was Officer Smith of the of the Skokomish Department of Public Safety. RP 113, 117. Officer Smith estimated that when the car passed him in the parking lot it was traveling “in excess of eighty miles an hour.” RP 117. The driving occurred in “a thirty-five mile an hour speed zone.” RP 118.

Sergeant Chris Newton of the Skokomish Department of Public Safety was the second officer in the parking lot, and he also observed the driving. RP 129, 130. He estimated the speed at “between eighty and ninety miles an hour.” RP 131.

The driver of the car attempted to make a left turn at a speed that was too fast to overcome the centrifugal force that was thrusting the car forward, and as a result the car continued forward and crashed into a pole. RP 192, 197-198. The car was traveling fast

enough that, when the car crashed, the steering wheel was deformed due to impact with the driver. RP 194, 197-198.

The laws of physics proved that the driver of the car crashed into the pole at a speed of *at least* 40 mph while trying to turn left. RP 198-200. Mr. Wahwassuck testified that Quintana “tried to turn and we were doing, like, a hundred and ten, slowed down to about ninety-five, and she hit the brakes to slow down to turn, and we just went straight and hit the telephone pole.” RP 216.

8. Was the evidence at trial, in the totality, sufficient to sustain the conviction?

The standard of review when considering a challenge to the sufficiency of the evidence is briefed in Section 3, above.

Mr. Wahwassuck suffered a broken leg when Quintana drove the car into a pole. RP 217. His leg was broken in three different places, and a surgeon installed plates in his leg to repair his injuries. An infection set in, and he ultimately lost his leg. RP 217.

Due to injuries suffered in the collision, Mr. Wahwassuck was treated by Dr. Helpenstell, who performed surgery on Mr. Wahwassuck’s leg. RP 348. Dr. Helpenstell “put the bones back together through open incisions...” and “fixed them with metal plates that had screws going across.” RP 348.

A partially full can of beer and a half-bottle of Barcardi Rum were found at the collision scene. RP 123, 127, 218. The inside of the wrecked car smelled strongly of alcohol. RP 169.

There is overwhelming evidence that, prior to and during the collision, Quintana was driving in Mason County on the date alleged as described in Section 3 of the State's brief, above.

There is overwhelming evidence that Quintana drove in a rash or heedless manner, with indifference for the consequences, as described in Section 7 of the State's brief, above.

There is overwhelming evidence that Quintana was, at the time of driving, impaired by the consumption of alcohol to the extent that her ability to drive was lessened to an appreciable degree, as described in Section 6 of the State's brief, above.

In summary, in review of the entire record and when viewed in the light most favorable to the State, there is substantial, overwhelming evidence in this case that on August 23, 2009, in Mason County, Washington, Quintana drove a motor vehicle in a rash or heedless manner, with indifference for the consequences, and while her ability to drive was lessened to an appreciable degree by the consumption of alcohol, and that her driving proximately caused substantial bodily injury to David Wahwassuck. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992).

9. Did Quintana receive ineffective assistance of counsel?

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Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011).

Quintana alleges that her counsel was ineffective because, in regard to the admission of evidence of the alcohol content of Quintana's blood, counsel did not object on the basis that the blood was not obtained and tested in compliance with the statutory requirements of a per se blood draw. As explained in other sections of this brief, however, there was no statutory or per se blood draw or test in this case. The information charged the per se prong of impaired driving (CP 84-85), but that element was not submitted to the jury. In regard to driving under the influence of intoxicants, the only question that went to the jury was whether, at the time of driving, Quintana was under the influence of or affected by alcohol to the extent that her ability to drive was affected to an appreciable degree. CP 67, 69, 73; RP 436-438. Accordingly, evidence of the alcohol content of Quintana's blood was submitted to the jury only on the question of whether her ability to drive was lessened to an appreciable degree by the consumption of alcohol.

Counsel is not ineffective for failure to bring a frivolous motion. There is a strong presumption that counsel's performance was reasonable. *State v. McFarland*, 127 Wn.2d 322, 335-337, 899 P.2d 1251 (1995). To prevail on the prejudice component, Quintana must show that if her trial counsel would have moved for suppression because the blood was not drawn or analyzed in the same manner as a statutory, per se blood draw, the result of the trial would have been different. *Id.* at 337.

Quintana is correct that the blood draw and analysis were inadmissible to prove a per se violation of RCW 46.61.502 and that her attorney's motion to suppress would or should have been granted if the blood were offered for this purpose. But as explained elsewhere in this brief, in the sections above, the blood was offered only to prove the affected-by prong of RCW 46.61.502 – that Quintana's ability to drive was lessened to an appreciable degree by the consumption of alcohol. The per se prong was not submitted to the jury; only the affected-by prong was submitted to the jury. The statutory requirements of a per se blood draw are only applicable to per se blood draws; thus, counsel's objection on this basis would not have resulted in suppression of the blood alcohol content, because the blood test results were only offered to prove the affected-by prong.

10. Was the jury correctly instructed in this case?

Quintana accepted without objection the jury instructions that were given to the jury in this case. RP 422.

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As described elsewhere in this brief, although Quintana was initially charged with the per se, affected-by, and reckless driving prongs of vehicular assault, but only the reckless driving and affected by alcohol prongs were submitted to the jury. CP 67, 69, 73, 84-85; RP 436-438.

As described above in other sections of the State's brief, there was substantial evidence presented at trial that proved beyond a reasonable doubt both prongs of vehicular assault that were submitted to the jury. Whether unanimity is required in regard to any one of the alternative means has been decided as follows:

And while our supreme court has stated that *it is desirable* [emphasis added] to determine whether the jury is unanimous on one of the alternative means in the event of reversal for insufficiency of the evidence, it is not required.

State v. Scott, 145 Wn. App. 884, 894, 189 P.3d 209, 214 (2008), citing *State v. Fortune*, 128 Wn.2d 464, 467, 909 P.2d 930, 931 (1996). The *Fortune* court wrote that:

[I]f sufficient evidence supports each alternative means of a charged crime, jurors can give a general verdict on that crime without giving express unanimity on which alternative means was employed by the defendant.

Fortune, 128 Wn.2d at 467. Accordingly, the *Fortune* court held as follows:

Although we hold that due process does not require express jury unanimity as to alternative means of a single crime, we emphasize the desirability of having jury unanimity on all aspects of a conviction. [Citations omitted]. Requiring the jury to be unanimous as to particular alternative means eliminates the possibility of a conviction being overturned should one of those alternatives not be supported by substantial evidence. [Citation omitted].

Id. at 475.

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“If there is sufficient evidence to support each alternative means submitted to the jury, the conviction will be affirmed because we infer that the jury rested its decision on a unanimous finding as to the means.” *State v. Randhawa*, 133 Wn.2d 67, 74, 941 P.2d 661 (1997), citing *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987).

As argued elsewhere in the State’s brief in response to Quintana’s assertions of insufficient evidence, particularly Sections 4, 5, 7, and 8, there is overwhelming evidence of both of the prongs of RCW 46.61.522 that were submitted to the jury, which consisted of RCW 46.61.522(1)(a) (the reckless driving prong) and RCW 46.61.522(1)(b), which incorporated RCW 46.61.502(1)(b) (the affected-by alcohol prong).

D. CONCLUSION

Quintana was not denied an opportunity to participate in jury selection, as the record shows that she was present in the courtroom for the entire jury selection process. Quintana does not point to any citation in the record where it is manifest that she was denied the opportunity to consult with her attorney in regard to the selection of peremptory strikes. She does not have a right to participate in the ministerial matter of approaching the bench and informing the court in regard to the identity of the jurors who were selected for peremptory strikes.

Quintana did not have a reasonable expectation of privacy in regard to the bruising on her chest when she was in a hospital emergency room being treated for

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injuries sustained in a vehicle collision. Her bruising was exposed to open view of all hospital personnel who were present during her treatment and had been exposed to medics who treated her prior to transport to the hospital. The officer's act of taking a photograph was for the mere purpose of documenting the existence of bruising that witnesses had seen and were qualified to testify about. If it was error to take a photograph, the error was harmless because other substantial evidence proved Quintana's guilt beyond a reasonable doubt.

DNA, blood splatter, and physics evidence each proved overwhelmingly beyond a reasonable doubt that Quintana was the driver, and the court on appeal must give deference to the eye-witness testimony of the injured passenger who testified that Quintana was the driver.

Quintana had no reasonable expectation of privacy in the blood test results once they were released into the stream of communications in the hospital, because she had then lost control of the blood test results that were not in her possession. Her only privacy was a statutory or common law right to medical records privacy and the corresponding evidentiary rule privilege. However, the privilege did not apply in this case because the blood test was taken by a physician from an individual not under arrest and was later determined to be evidence in a criminal case.

The blood test was not required to be conducted in compliance with the statutory requirement of a per se blood draw because the per se prong was not submitted to the jury and the blood test results were relevant only to the affected-by prong of impairment.

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The blood test results were not inadmissible hearsay because the witnesses who testified in court were the ones who conducted the test, and it was proper to allow them to refer to their reports when their memory was exhausted. Medical experts routinely refer to and rely upon their own reports and the reports of others when rendering opinions, and the rules of evidence allow this to occur.

There is overwhelming evidence from accident reconstruction and eye-witness testimony that Quintana drove in a rash or heedless manner and with indifference to the consequences.

There is overwhelming evidence of each element of the offense of vehicular assault and both of the alternative prongs submitted to the jury.

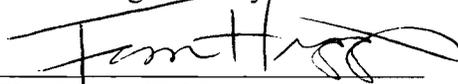
Quintana's attorney was not ineffective for not objecting to evidence that was not presented or for not objecting on grounds that had no application to the evidence.

Because there is substantial, overwhelming evidence to support each of the elements, and both of the alternatives, submitted to the jury, and because the jury was properly instructed as to the law, the jury instructions were correct.

Accordingly, Quintana's appeal should be denied and her conviction affirmed.

DATED: April 15, 2011.

MICHAEL DORCY
Mason County
Prosecuting Attorney,


Tim Higgs (WSBA #25919)
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,)
)
Respondent,)
)
vs.)
)
BARBARA H. QUINTANA,)
)
Appellant,)
_____)

No. 41098-2-II
DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

11 APR 19 AM 9:32
MASON COUNTY PROSECUTOR'S OFFICE
SHELTON, WA 98584
MARGIE OLINGER

I, MARGIE OLINGER, declare and state as follows:

On April 15, 2011, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Patricia Pethick
P.O. Box 7269
Tacoma, WA 98417-0269

I, Margie Olinger, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 15th day of April, 2011, at Shelton, Washington.


Margie Olinger