

No. 47578-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shaun Johnson,

Appellant.

Clark County Superior Court Cause No. 13-1-01964-7

The Honorable Judge David E. Gregerson

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Johnson's conviction was obtained in violation of her right to due process under the Fourteenth Amendment.
2. Ms. Johnson's conviction was obtained in violation of her Sixth and Fourteenth Amendment right to a jury trial.
3. The trial court erroneously admitted improper opinion testimony, in violation of ER 701 and ER 702.
4. Detective Luque's improper opinion testimony infringed Ms. Johnson's right to an independent jury determination of the facts.
5. Detective Luque's "expert" opinion that Ms. Johnson was impaired should have been excluded under ER 702 because it lacked an adequate foundation, given his failure to comply with the mandatory twelve-step DRE protocol required for testimony of drug recognition experts.
6. The trial judge erred by allowing Karen Nelson "to speculate" that Ms. Johnson "was on meth."
7. Nelson's improper opinion testimony infringed Ms. Johnson's right to an independent jury determination of the facts.
8. Nelson's lay opinion was inadmissible under ER 701 because it was not rationally based on her perceptions or helpful to the jury, and because it fell within the scope of ER 702.
9. Nelson's "expert" opinion that Ms. Johnson "was on meth" should have been excluded under ER 702.

ISSUE 1: The improper admission of an opinion on guilt violates an accused person's right to an independent jury determination of the facts. Did the improper admission of opinion testimony violate Ms. Johnson's Sixth and Fourteenth Amendment right to a jury trial?

ISSUE 2: ER 702 permits introduction of expert opinion, but only if provided by a qualified expert, based on a theory generally accepted in the scientific community, and helpful to the jury. Did the trial court abuse its discretion by admitting expert opinions from Nelson and Detective Luque?

ISSUE 3: ER 701 prohibits introduction of a lay opinion unless rationally related to the witness's perception, helpful to the jury, and outside the scope of ER 702. Did the trial court abuse its discretion by admitting Nelson's lay opinion under ER 701?

10. The trial court erred by denying Ms. Johnson's motion to suppress items obtained in violation of her right to be free from unreasonable searches and seizures under the Fourth Amendment.
11. The trial court erred by denying Ms. Johnson's motion to suppress items obtained in violation of her right to privacy under Wash. Const. art. I, § 7.
12. The trial court erred by finding that "community caretaking" justified Deputy Gosch's intrusion into Ms. Johnson's purse without her consent.
13. The trial court erred by admitting evidence tainted by the initial warrantless search.
14. The trial court erred by upholding a search warrant unsupported by probable cause.
15. The trial court erred by adopting Finding of Fact No. 9.
16. The trial court erred by adopting Finding of Fact No. 31.
17. The trial court erred by adopting Conclusion of Law No. 2.
18. The trial court erred by adopting Conclusion of Law No. 5.
19. The trial court erred by adopting Conclusion of Law No. 7.
20. The trial court erred by adopting Conclusion of Law No. 9.
21. The trial court erred by adopting Conclusion of Law No. 10.

22. The trial court erred by adopting Conclusion of Law No. 11.

ISSUE 4: The state and federal constitutions prohibit “community caretaking” searches unless six criteria are met. Did the warrantless intrusion into Ms. Johnson’s purse without her consent violate her rights under the Fourth Amendment and art. I, § 7?

ISSUE 5: Probable cause supporting a search warrant must be based on “reasonably trustworthy information.” Did Luque fail to produce reasonably trustworthy information that Ms. Johnson drove while impaired by drugs, given his failure to undertake mandatory steps under the drug recognition protocol?

23. Ms. Johnson’s convictions violated her Fourteenth Amendment right to due process.

24. The court’s instructions relieved the state of its burden to prove the essential elements of vehicular assault.

25. The court’s instructions failed to make the relevant legal standard manifestly clear to the average juror.

26. The court’s “to convict” instruction allowed conviction absent proof of ordinary negligence, an essential element of vehicular assault by means of intoxicated driving.

27. The court’s instructions as a whole allowed the jury to convict Ms. Johnson of vehicular assault by means of intoxicated driving without proof of ordinary negligence.

28. The trial court erred by giving Instruction No. 11.

ISSUE 6: A “to convict” instruction must include every essential element of an offense. Did the court’s “to convict” instructions allow conviction without proof of ordinary negligence, an essential element of vehicular assault by means of intoxicated driving?

ISSUE 7: Jury instructions in a criminal case violate due process if they relieve the prosecution of its burden to prove the elements of an offense. Must Ms. Johnson’s convictions be

reversed because the court's instructions relieved the state of its burden to prove ordinary negligence?

29. Ms. Johnson's vehicular assault conviction violated her Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against her.
30. The vehicular assault conviction violated Ms. Johnson's state constitutional right to notice under Wash. Const. art. I, §§ 3 and 22.
31. The Information was deficient because it failed to allege ordinary negligence, an essential element of vehicular assault by means of intoxicated driving.

ISSUE 8: A criminal Information must set forth all of the essential elements of an offense. Did the state's failure to allege ordinary negligence violate Ms. Johnson's right to notice of the essential elements of vehicular assault?

32. Prosecutorial misconduct deprived Ms. Johnson of her Fourteenth Amendment due process right to a fair trial and her Fifth and Fourteenth Amendment privilege against self-incrimination.
33. The prosecutor committed misconduct by asking the jury to penalize Ms. Johnson for asserting her constitutional rights.
34. The prosecutor committed misconduct by urging the jury to convict based in part on defense counsel's failure to concede guilt on the possession charge.

ISSUE 9: A prosecutor commits misconduct by urging jurors to penalize an accused person for exercise of a constitutional right. Did the prosecutor commit reversible misconduct by asking jurors to draw a negative inference from defense counsel's refusal to concede guilt on the possession charge?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Shaun Johnson was driving in rural Clark County. RP 4, 236-238. She was smoking, and she dropped her cigarette. She leaned down to get it and went off the road. RP 314, 416. She found herself in the ditch, with a broken arm and in significant pain. RP 10, 241-244.

Karen Nelson was driving on that road, saw that Ms. Johnson's car had gone into the ditch, and stopped to help. RP 286-292. She noted that Ms. Johnson was shaken; another driver called 911. RP 293-294, 328. Deputy Gosch arrived, talked with Ms. Johnson, and she was taken to the hospital. RP 4-5, 20. Gosch searched Ms. Johnson's purse for her license and insurance information. RP 16. Inside the purse, he found two bindles of suspected methamphetamine. RP 18.

Gosch completed his reports, called for Ms. Johnson's vehicle to be towed, and left the area. RP 21-23, 248-251. The two truck operator had put the car on the lift and was ready to leave when he heard a call for help. RP 337, 342. He found 16 year old Justin Carey in the grass, unable to move.¹ RP 343-345, 572. Ms. Johnson didn't see him or know that she had hit him. RP 717-718.

¹Carey later lost his leg. RP 555-556.

Ms. Johnson had told aid personnel that she'd used methamphetamine two days before. RP 246-248. She was given various opiates in the ambulance and once she arrived at the hospital. RP 433-440. Throughout the incident, at the location of the accident as well as later at the hospital, Ms. Johnson was cordial and cooperative. RP 415.

Detective Luque, a Drug Recognition Expert (DRE), went to the hospital to evaluate Ms. Johnson. RP 365-376, 409. He did not complete the DRE protocol with Ms. Johnson. RP 453-456. Instead, he sought and obtained a search warrant for Ms. Johnson's blood.² RP 445-452. A sample was taken, roughly 7 hours after the accident. RP 452. This sample revealed a methamphetamine level of 0.11 mg. RP 767.

The state charged Ms. Johnson with vehicular assault, possession of methamphetamine, and bail jumping.³ CP 114. The vehicular assault charge alleged that Ms. Johnson "did operate or drive a vehicle while under the influence of or affected by intoxicating liquor, marijuana, or any drug, and did cause substantial bodily harm to another." CP 114. That count also carried an allegation that the victim's injuries substantially

²Ms. Johnson offered to consent to a blood draw. RP 500-504.

³ During closing argument, the defense acknowledged that the state had met its burden of proof beyond a reasonable doubt as to the bail jumping charge. RP 1002. That conviction is not at issue in this brief.

exceeded the level of bodily harm necessary to satisfy the elements. CP 114.

Ms. Johnson moved to suppress, arguing that her rights were violated when Gosch opened and looked in her purse. RP 29-69.

At the suppression hearing, Deputy Gosch testified that when he first spoke with Ms. Johnson, she was still in her car. He said he asked her for her license and she gave it to him. RP 11, 32. When he came back to ask her for her registration and insurance, she was in the ambulance. She told him the documents were in her car. RP 12-15. Gosch looked in her glove box, finding the registration but not the insurance information. RP 15-16. According to Gosch, he asked her again about the insurance, and she said that it could be in her purse. RP 16.

Deputy Gosch told the court he was not doing a criminal investigation at this point. RP 15, 39. He didn't ask Ms. Johnson for permission when he looked into her purse. RP 16, 34. Gosch also acknowledged that there were no health or safety concerns that caused him to need to search her purse. RP 37-39. He said that he found two small baggies with suspected methamphetamine in her purse. RP 18. Gosch also described his training and experience, which included investigating impaired driving. RP 1-2, 18-19, 29, 35. He saw no signs of alcohol

intoxication or any other kind of impairment when he spoke with Ms. Johnson multiple times soon after the accident. RP 18-19.

The court denied the suppression motion.⁴ RP 48; CP 167-174. The judge orally found that the search of the purse was reasonable under the totality of the circumstances. RP 48. The written order indicated that the search was justified by community caretaking. CP 173.

The defense also moved to suppress the results of the blood draw. Challenging the sufficiency of probable cause for the warrant to draw Ms. Johnson's blood, the defense argued that any conclusions from Luque's Drug Recognition Examination could not support the warrant since he did not complete the protocol. CP 1-10; RP 136-137, 140-145, 149-150. Additionally, since Ms. Johnson was administered multiple doses of opiates prior to the draw, any results of a DRE would be suspect. RP 140-145; CP 1-10. The court denied the motion. RP 162-163; CP 167-173. The jury was told that Ms. Johnson had 0.11 mg of methamphetamine in her blood. RP 767.

At trial, Gosch told the jury he saw no signs of impairment. RP 265-267. Over defense objection, Gosch testified that Ms. Johnson told ambulance staff that she was a methamphetamine addict. RP 202-208, 247.

The state sought to qualify lay witness Karen Nelson as an expert who could opine that immediately after the accident, Ms. Johnson appeared to be on methamphetamine. RP 273-286. Nelson's expertise came from her own use of methamphetamine, as well as her use of other controlled substances, including heroin and marijuana. RP 301-302. The court approved the testimony over the defense's objection. RP 304, 308, 310.

Nelson told the jury that Ms. Johnson was seated in her car during their entire contact, that Ms. Johnson was shaken by the accident, and that Nelson had to work to calm Ms. Johnson down. RP 293-294, 296. Nelson acknowledged that Ms. Johnson had just been in an accident which could cause a person to seem anxious, nervous and unfocused – all of which she said were signs of methamphetamine use. RP 302-303. She admitted that she had no knowledge of what a person would be like following an accident, and that she did no testing of Ms. Johnson. RP 315-319. She also disclosed that she did not come forward with her opinion as to Ms. Johnson's methamphetamine use until after she had learned that methamphetamine was found in Ms. Johnson's purse. RP 320.

Over defense objection, Nelson testified: "If I was to speculate I would say that she was on meth." RP 304. The trial judge interjected:

⁴ The defense renewed the motion to suppress again later; it was again denied. RP 120-126.

And ma'am, let me just clarify. You used a word speculate and so that has some legal significance when we use the word speculate. And I can have you speculate in court. So there's a difference between speculation and having an educated estimate or a reasonable estimate or some basis for an opinion.
RP 305.

The defense moved for a mistrial, which the judge denied. RP 305-310.

Detective Luque testified at some length at the jury trial. RP 365-509. He explained how DRE tests are done, what each test shows, the seven types of controlled substances that he can identify, and the effects of each. RP 365-406. Luque had Ms. Johnson perform the horizontal gaze nystagmus test and saw no clues of impairment. RP 423-426. He described the testing he did do, and the results he obtained which did not support an impairment. He surmised that the effects of opiates, a depressant, could effectively cancel out the effects of methamphetamine, a stimulant. RP 439-444. Luque told the jury that though he did not complete the DRE, he could opine that Ms. Johnson was impaired. He acknowledged that he did not have Ms. Johnson get out of her hospital bed, and that he did not identify any clues to impairment from his medical examination. RP 461, 472-476, 497.

The court declined to give defense instructions identifying the standards that must be met before a DRE can render an opinion. RP 808-813, 895.

The judge listed the elements of vehicular assault in Instruction 11:

- (1) That on or about June 10, 2013, Shaun Christine Johnson, the defendant, operated or drove a vehicle;
 - (2) That the defendant's vehicle operation or driving proximately caused substantial bodily harm to another person;
 - (3) That at the time the defendant was under the influence of any drug; and
 - (4) That this act occurred in the State of Washington.
- CP 149.

The prosecutor told the jury during closing arguments that it was their job to make sure that Ms. Johnson faced the consequences of her actions. RP 955. He said that since there were no alternative explanations offered, Ms. Johnson must have hit Carey. RP 978. He reminded the jury about Nelson's opinion that Ms. Johnson appeared to be on methamphetamine. RP 960, 988-989, 1021. He also urged the jury to give extra weight to Detective Luque's opinion that Ms. Johnson was impaired, because of his expertise and training in the area. RP 963-964. He also repeatedly told the jury that they did not have believe there was any bad driving at all, nor did they have to believe that the accident was caused by an impairment, in order to return a verdict of guilty. RP 990-992, 993-996.

When Ms. Johnson's attorney gave his closing argument, he acknowledged that the state had proven the charge of bail jumping. RP 1002. The prosecutor addressed this in rebuttal:

[I]t appears that Defense is conceding the Defendant committed the crime of bail jump. If they're willing to concede that[,] the meth possession is so -- even so much clearer than that. Why can't he then -- why can't they concede that? I mean is there any doubt, not just reasonable doubt, is there any doubt that the methamphetamine belonged to her? Was in her purse? That she possessed it? No. And Defense didn't even concede that and ask you weigh that. So that should clue you in on where the Defense is coming from.
RP 1019.

The jury convicted Ms. Johnson of all three counts, and answered in the affirmative to the special verdict. RP 1032-1034. Ms. Johnson was sentenced and timely appealed. CP 175-193.

ARGUMENT

I. THE TRIAL COURT VIOLATED Ms. JOHNSON'S RIGHT TO A JURY DETERMINATION OF THE FACTS BY ALLOWING THE STATE TO INTRODUCE IMPROPER OPINION TESTIMONY AS TO HER GUILT.

A. Standard of Review

Constitutional issues are reviewed *de novo*. *State v. Beaver*, No. 91112-6, 2015 WL 5455821, at *3 (Wash. Sept. 17, 2015). Ordinarily, evidentiary rulings are reviewed for an abuse of discretion. *See Wuth ex rel. Kessler v. Lab. Corp. of Am.*, No. 71497-0-I, 2015 WL 5009407, at *13 (Wash. Ct. App. Aug. 24, 2015).⁵ However, where the appellant

⁵ A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). An

makes a constitutional argument regarding a trial court's discretionary decision, review is *de novo*. See, e.g., *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009).

A manifest error affecting a constitutional right can be raised for the first time on appeal. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015); RAP 2.5(a)(3). To raise a manifest error, an appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.* An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

Opinion testimony on the accused person's guilt can create a manifest error affecting the Sixth and Fourteenth Amendment right to a jury trial. U.S. Const. Amends VI, XIV; *State v. King*, 167 Wn. 2d 324, 331, 219 P.3d 642 (2009).⁶

erroneous evidentiary ruling of non-constitutional dimension requires reversal if there is a reasonable probability that it materially affected the outcome. *State v. Asaeli*, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009).

⁶ Ms. Johnson objected to the improper opinion testimony below, but did not cite to *Quaale* and did not specifically mention the Sixth Amendment right to a jury trial. RP 497. Even if

B. The trial court improperly allowed Luque to testify that Ms. Johnson was “impaired,” in violation of the Supreme Court’s decision in *Quaale*.

1. The evidence should have been excluded under *Quaale*.

The Supreme Court has placed limits on testimony from Drug Recognition Experts. A properly qualified DRE who has undertaken the entire twelve-step drug recognition protocol may opine that a suspect’s behavior and attributes are either consistent or inconsistent with drug use. *State v. Quaale*, 182 Wn.2d 191, 198, 340 P.3d 213 (2014) (citing *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000)).

However, the DRE “may not testify in a manner that casts an ‘aura of scientific certainty to the testimony.’” *Id.*, (quoting *Baity*, 140 Wn.2d at 17). Furthermore, “[t]he officer... cannot predict the specific level of drugs present in a suspect.” *Id.*

In *Quaale*, an officer administered the Horizontal Gaze Nystagmus (HGN) test⁷ and testified at a subsequent DUI trial that “[t]here was no doubt [the driver] was impaired.” *Id.* at 195. This testimony “violated the limitations set out in *Baity*.” *Quaale*, 182 Wn.2d at 198.

his objection did not preserve the constitutional error. this court should review appellant’s constitutional argument on its merits under RAP 2.5(a)(3). The lower court’s errors had practical and identifiable consequences: “given what the trial court knew at that time, the court could have corrected the error[s]” by excluding the improper opinion testimony. *O’Hara*, 167 Wn.2d at 100; *Lamar*, 180 Wn.2d at 583.

⁷ The HGN test is one of the twelve steps of the drug recognition protocol. *Id.*

The officer in *Quaale* improperly “cast his testimony in a way that gave it an aura of scientific certainty.” *Id.* He also improperly implied that the HGN could reveal that someone is impaired, when, in fact, it “simply shows physical signs consistent with alcohol consumption.” *Id.*, at 198-199.

In addition, by using the word “impairment,” the officer improperly “testified to a specific level of intoxication.” *Id.*, at 199. The *Quaale* court decided that expert testimony regarding impairment “implicitly includes a specific level of intoxication; that the alcohol consumed impaired the defendant, which is the legal standard for guilt.” *Id.*⁸

Ms. Johnson’s case is directly controlled by *Quaale*.

Over objection, Detective Luque opined that Ms. Johnson was “impaired,” despite having even less evidence than the officer in *Quaale*.⁹ RP 496-497. Luque acknowledged that he was testifying as an expert, made use of the DRE chart,¹⁰ and spoke at length about his training as a DRE. RP 365-408, 461-471. He implied that the drug recognition

⁸ By telling jurors he had “no doubt,” the officer improperly “cast his testimony in a way that gave it an aura of scientific certainty.” *Id.* He

⁹ When Luque administered the HGN, he saw *no* nystagmus. RP 423-426.

¹⁰ *See Baity*, 140 Wn.2d at 17.

protocol did not require him to perform all twelve steps. RP 404-408. He told the jury he'd done 30-40 "formal" DRE evaluations and countless informal assessments. RP 496-497. He claimed his ability to opine on Ms. Johnson's impairment stemmed not just from his observations, but also from his "base of knowledge," and his training and experience as a DRE. RP 496-497.

As in *Quaale*, this exceeded the limits set by *Baity*. *Id.* Luque did not follow the twelve-step drug recognition protocol but claimed an ability to judge impairment. He gave his opinion an improper "aura of scientific certainty" by linking it to his expertise as a DRE, and by implying that the protocol did not require completion of all twelve steps. *Id.*, at 198.

The evidence should have been excluded.

2. Luque's testimony amounted to an impermissible opinion on guilt, in violation of Ms. Johnson's Sixth and Fourteenth Amendment right to a jury trial.

As in *Quaale*, Luque's testimony was an improper opinion on guilt. Luque's opinion that Ms. Johnson was impaired "went to the core issue and the only disputed element: whether [she] drove while under the influence of [drugs]." *Quaale*, 182 Wn.2d at 200.

Luque admitted that he was testifying as an expert; he did not claim that he was simply expressing an informal lay opinion. RP 461-471. Furthermore, the state based its closing argument on his expertise. RP

963, 989. Thus Luque’s improper testimony cannot be dismissed as a mere expression of lay opinion based solely on his observations. *Cf. Quaale*, 182 Wn.2d at 200-201 (distinguishing *City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993)).

The error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *Id.*, at 201-202. Respondent cannot meet that burden here.

The improper admission of opinion testimony from a law enforcement officer “may be especially prejudicial.” *King*, 167 Wn.2d at 331. Such testimony “often carries a special aura of reliability.” *Id.* (quoting *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)).

Here, as in *Quaale*, Luque’s improper opinion testimony provided the main evidence of actual impairment. *Quaale*, 182 Wn.2d at 201-202. Without it, a reasonable jury could have decided to acquit. *Id.*

The improper admission of Luque’s opinion infringed Ms. Johnson’s right to a jury trial. *Quaale*, 182 Wn.2d at 197. Her conviction must be reversed and the case remanded for a new trial. *Id.*

3. If the error is not preserved and cannot be raised for the first time on appeal, Ms. Johnson was denied the effective assistance of counsel.

Defense counsel timely objected to the admission of Luque’s opinion that Ms. Johnson was impaired:

Objection, Your Honor. He did not do the twelve step analysis. He can't give that opinion.
RP 497.

Counsel repeatedly referred to *Baity*, in argument to the court and in an effort to examine Detective Luque. He proposed a jury instruction based on *Baity*, and even sought to admit a page of the opinion as an exhibit. RP 808-813, 919-921, 934-938.

Given the context, counsel's objection should have alerted the trial court to a foundational error under ER 702 and to the risk of an improper opinion on guilt. *See State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987); *see also Quaale*, 186 Wn.2d at 195, 197. However, it does not appear that counsel mentioned *Quaale*, decided only a few months prior to the start of trial. Nor does it appear that he explicitly mentioned the federal or state constitutional jury trial right.¹¹

If counsel's objection is insufficient to preserve the error for review,¹² then Ms. Johnson was denied the effective assistance of counsel.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person.

¹¹ He did not explicitly mention ER 702; however, his reference to "the twelve step analysis" should have alerted the trial court to the nature of the objection. RP 497.

Kyllo, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend. VI; *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *Id.*

Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and there is a reasonable probability that the result of the trial would have been different without the inadmissible evidence. *Id.*

The fact that counsel objected to Luque's improper opinion testimony shows that he was pursuing a strategy of excluding the evidence. RP 497. Accordingly, counsel's failure to argue the correct grounds for his objection cannot be explained as a legitimate strategic or tactical choice. *Saunders*, 91 Wn. App. at 578.

¹² And if the error cannot be addressed for the first time on appeal pursuant to RAP 2.5(a)(3).

A successful objection would have resulted in exclusion of Luque's improper opinion. *Quaale*, 182 Wn.2d at 197-198. The testimony was critical, because the prosecution had no other evidence showing actual impairment. There is a reasonable probability that the result of the trial would have been different had counsel mentioned *Quaale* or objected on Sixth Amendment grounds

If the error is not preserved, Ms. Johnson was denied her right to effective assistance. *Kyllo*, 166 Wn.2d at 862. Her conviction for vehicular assault must be reversed and the charge remanded for a new trial. *Id.*

C. The trial court should not have allowed Nelson to opine that Ms. Johnson had used methamphetamine.

Before it may be placed before the jury, a witness's opinion on an ultimate issue "must be 'otherwise admissible.'" *Quaale*, 182 Wn.2d at 197 (quoting ER 704). When opinion testimony addressing an ultimate issue is not 'otherwise admissible,' it "may constitute an impermissible opinion on guilt." *Id.* Circumstances to be considered include "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *Hudson*, 150 Wn. App. at 653; *see also Quaale*, 182 Wn.2d at 199-200.

Here, Nelson was permitted to opine that Ms. Johnson showed signs consistent with methamphetamine use. This opinion should have been excluded, because it did not qualify for admission as either an expert or a lay opinion.

1. Nelson’s testimony was not admissible under ER 702

The admissibility of expert testimony is governed by ER 702, which provides that:

If scientific, technical, *or other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by *knowledge*, skills, *experience*, training, or education may testify thereto in the form of an opinion or otherwise.

ER 702 (emphasis added). Under this rule, “(1) the witness must be qualified as an expert; (2) the opinion must be based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony must be helpful to the trier of fact.” *Black*, 109 Wn.2d at 341.

Here, the prosecutor sought to show that Nelson had “specialized knowledge” in the form of her past experiences as a methamphetamine user. RP 273-286, 301-302. Her history, according to the state, provided her sufficient “knowledge... [and] experience”¹³ to provide an expert opinion under ER 702. RP 273-286, 301-302.

¹³ ER 702.

Despite the state's efforts to qualify her as an expert, Nelson's testimony should have been excluded because the state did not establish the foundation for admission under ER 702.

First, Nelson was not qualified to render an opinion in this case despite her past methamphetamine use and prior drug associations. As she candidly admitted, she did not know how to assess Ms. Johnson's appearance and behavior in light of the fact that she'd suffered an accident. RP 319. Regardless of her knowledge, experience, and ability to recognize the "symptoms" of methamphetamine use under ordinary circumstances, she did not have the qualifications to render such an opinion regarding a person who had just been involved in an accident. RP 319.

Second, Nelson's testimony was not based on "an explanatory theory generally accepted in the scientific community." *Id.* Her conclusion—that Ms. Johnson's "mannerisms" and "motions"¹⁴ were consistent with methamphetamine use—is like the conclusion DREs give after undergoing the entire twelve-step drug recognition protocol, which *is* based on generally accepted principles.¹⁵ *See Baity*, 140 Wn.2d at 18. But Nelson was not trained on the protocol and did not undertake the twelve

¹⁴ RP 323.

¹⁵ Indeed, counsel pointed this out during argument. RP 276-278.

steps. She should not have been allowed to give the same opinion as a trained DRE who properly applied the protocol. *Cf. Baity*, 140 Wn.2d at 18.

Third, the evidence was not helpful to the jury. Her opinion consisted of nothing more than speculation. She herself explicitly framed her opinion by saying “If I was to speculate I would say that she was on meth.” RP 304. She based her speculation in part on her belief that Ms. Johnson “looked older and tired-er [sic] than what [Nelson] would’ve thought for a woman her age.” RP 323.¹⁶ As this statement shows, Nelson’s opinion was actually a general suspicion that Ms. Johnson was an addict, not a conclusion that she had used methamphetamine prior to driving. Under the circumstances, his testimony did not aid the trier of fact.¹⁷ The evidence should have been excluded under ER 702. *Black*, 109 Wn.2d at 341.

2. Nelson’s testimony did not qualify as a “lay opinion,” and should have been excluded under ER 701.

A lay witness may testify to opinions or inferences that are “(a) rationally based on the perception of the witness, (b) helpful to a clear

¹⁶ Nelson didn’t actually know Ms. Johnson’s age. RP 324.

¹⁷ The prosecution did not introduce testimony from the medical personnel who came into contact with Ms. Johnson. Presumably, the EMTs, doctors, and nurses would have had more training and experience assessing the appearance and behavior of accident victims who may have used drugs.

understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.” ER 701.

Nelson’s testimony should not have been admitted as a lay opinion.

First, the opinion testimony should be analyzed as an expert opinion under ER 702, rather than a lay opinion under ER 701. The state claimed that Nelson had “specialized knowledge,” and sought to portray her as an expert. RP 273-286, 301-312. The evidence was therefore not a proper lay opinion. ER 701(c).

Second, Nelson’s opinion was not “rationally based” on her perceptions. As noted above, Nelson suspected that Ms. Johnson may have used methamphetamine in part because she “looked older and tired-er [sic] than what [Nelson] would’ve thought for a woman her age.” RP 323. Nelson was ignorant of Ms. Johnson’s actual age. RP 324. She allowed her perception of Ms. Johnson’s general appearance (“older and tired-er”) to inform her opinion that Ms. Johnson was currently under the influence of methamphetamine. RP 323. She admitted she did not know what effect the accident and resulting injuries might have had. RP 303, 315, 319.

Third, Nelson’s opinion was not “helpful.” ER 701(b). Ms. Johnson admitted to Gosch and Luque that she was a methamphetamine addict. RP 247. Nelson’s testimony did no more than purport to confirm this.

The evidence should have been excluded. ER 701; *King*, 167 Wn.2d at 331.

II. THE COURT IMPROPERLY DENIED MS. JOHNSON’S MOTION TO SUPPRESS EVIDENCE UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND ART. I § 7.

A. Standard of Review.

The validity of a warrantless search is reviewed *de novo*. *State v. Westvang*, 174 Wn. App. 913, 918, 301 P.3d 64 (2013). A trial court’s findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.* In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn. App. 541, 562, 222 P.3d 1217 (2009).

The validity of a search warrant is an issue of law reviewed *de novo*. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

B. No exception to the warrant requirement justified the warrantless search of Ms. Johnson’s purse.

Both the Fourth Amendment¹⁸ and art. I, § 7 prohibit searches and seizures without a search warrant.¹⁹ *Westvang*, 301 P.3d at 68; U.S. Const Amends. IV; XIV; art. I, § 7. This “blanket prohibition against warrantless searches is subject to a few well guarded exceptions...” *Id.* When police have ample opportunity to obtain a warrant, courts do not look kindly on their failure to do so. *State v. White*, 141 Wn. App. 128, 135, 168 P.3d 459 (2007) (White I) (internal citation omitted).

The state bears the heavy burden of showing that a search falls within one of the narrowly drawn exceptions to the warrant requirement. *Westvang*, 301 P.3d at 68. Before evidence seized without a warrant can be admitted at trial, the state must establish an exception to the warrant requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Unlike the Fourth Amendment, art. I, § 7 focuses on individual rights and the expectation of privacy, not the reasonableness of police

¹⁸ The fourth amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

¹⁹ Art. I, § 7 provides stronger protection to individual privacy rights than does the Fourth Amendment. *State v. Meneese*, 174 Wn.2d 937, 946, 282 P.3d 83 (2012). Accordingly, the six-part *Gumwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to art. I, § 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998) (White II); *State v. Gumwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

conduct. *State v. Monaghan*, 165 Wn. App. 782, 787, 266 P.3d 222 (2012). Thus, under the state constitution, a warrantless search presumptively violates the state constitution whether reasonable or not. *Id.* Good faith on the part of the officers is not enough to satisfy art. I, § 7. *State v. Schultz*, 170 Wn.2d 746, 760, 248 P.3d 484 (2011).

The community caretaking exception to the warrant requirement permits “limited invasion” of a person’s privacy when required in order for law enforcement to render aid or assistance. *Schultz*, 170 Wn.2d at 754. There are two “aspects” of community caretaking: (1) emergency aid and (2) routine health and safety checks. *See State v. Weller*, 185 Wn. App. 913, 923, 344 P.3d 695 *review denied*, 183 Wn.2d 1010, 352 P.3d 188 (2015).

Neither aspect applies here. Deputy Gosch did not search Ms. Johnson’s purse to provide emergency aid; nor did he do so as part of a routine check on her health or safety. RP 38.

In order to justify a search under either aspect, the government must show that (1) “the officer subjectively believed that someone likely needed health or safety assistance,” (2) the officer’s belief was reasonable, (3) there was “a reasonable basis to associate the need for assistance with

the place searched.” *Id.*, at 925.²⁰ In addition, the state must prove that any intrusion was reasonable.²¹ *Id.*

The search of Ms. Johnson’s purse cannot be justified under the community caretaking exception. Deputy Gosch’s decision to look in the purse was not based on a subjective belief that Ms. Johnson needed health or safety assistance; he did so to retrieve her license²² and proof of insurance. RP 61-62; CP 2. Any belief that she needed him to look in her purse for health or safety reasons would not have been reasonable. *Id.* Furthermore, the state did not establish the additional requirements necessary to satisfy the “emergency aid” aspect of community caretaking. *Schultz*, 170 Wn.2d at 754.

The search of Ms. Johnson’s purse cannot be justified under the community caretaking exception to the warrant requirement. *Id.* The court erred by denying Ms. Johnson’s motion to suppress. *Id.*

C. Luque’s affidavit did not establish probable cause for issuance of a warrant to seize Ms. Johnson’s blood.

Under both the Fourth Amendment and art. I, § 7, search warrants

²⁰ See also *Schultz*, 170 Wn.2d at 754. The “emergency aid” aspect has three additional requirements, and “allows searches resulting in a greater intrusion.” *Weller*, 185 Wn. App. at 924, 925 n. 10 (citing *Schultz*).

²¹ This “depends upon a balancing of the individual’s interest in freedom from police interference against the public’s interest in having the police perform a community caretaking function.” *Id.*

²² The details of which he’d already recorded. RP 32.

must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). An affidavit in support of a search warrant “must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

By itself, an inference drawn from the facts “does not provide a substantial basis for determining probable cause.” *Lyons*, 174 Wn.2d at 363-64. Conclusory statements of an affiant’s belief do not support a finding of probable cause. *Id.*, at 365. The affidavit must be based on more than mere suspicion or personal belief. *Neth*, 165 Wn.2d at 182.

In this case, the affidavit in support of the blood draw warrant did not establish probable cause. Luque provided the following information: Ms. Johnson left a straight section of road and collided with a pedestrian. CP 55. She explained that she’d driven off the side of the road while trying to retrieve a lit cigarette she’d dropped on the floor of her car. CP 56. She also said she’d used marijuana and methamphetamine two days earlier. CP 56. Two baggies of methamphetamine were found in her purse. CP 55.

Luque did not relay any observations regarding Ms. Johnson’s

condition prior to treatment by medical staff.²³ After the accident, she'd been administered a "large amount of opiate based narcotics." CP 56. She appeared depressed, her movements were slow, and her speech was "slow and delayed." CP 56. Despite this, Luque described her as "alert, awake, and responsive." CP 56. He relayed her vital signs, which he characterized as "elevated," in contrast to the "depressed" vitals expected for a person who'd been administered narcotics.²⁴ CP 56-57. He noted that her pupils were "3.5 MM [sic] in dilation," and later said they were "additionally dilated when in comparison [sic] to what would be expected with the use of these narcotics." CP 57.

Even when considered together, this information does not amount to probable cause to believe that Ms. Johnson was "under the influence of or affected by"²⁵ drugs at the time of the accident: Luque did not (and could not) say that her ability to drive was "lessened in an appreciable degree"²⁶ prior to the administration of a "large amount of opiate based narcotics" by medical staff. CP 56. Although he qualified as a Drug

²³ In fact, Deputy Gosch had seen no signs of impairment. RP 37. Luque did not relay this information to the issuing magistrate. CP 55-57. Nor did he reveal that he'd administered the HGN test and found no nystagmus. CP 55-57; RP 423-426.

²⁴ In fact, the blood test did not reveal the presence of opiates or other narcotics, suggesting their effects had dissipated by the time Luque observed Ms. Johnson. RP 776-777. This is consistent with the short half-life of the drugs administered by medical personnel. RP 783.

²⁵ RCW 46.61.502.

²⁶ See, e.g., *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995).

Recognition Expert, Luque did not claim he'd administered the twelve-step protocol required under *Baity*, 140 Wn.2d 1. Nor did he purport to have special expertise in judging impairment from the combined effect of antagonistic drugs. CP 53-58. Nor did he suggest that he could untangle the shock and other effects of the accident from the effects of the narcotics and any prior drug use. CP 53-58.

The affidavit failed to establish probable cause. Accordingly, the warrant authorizing the blood draw should not have issued, and the blood test results should have been suppressed. *Lyons*, 174 Wn.2d at 368.

III. THE VEHICULAR ASSAULT CONVICTION VIOLATED DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF THAT OFFENSE.

A. Standard of Review

Jury instructions are reviewed *de novo*. *Kessler*, No. 71497-0-I, 2015 WL 5009407, at *19. Furthermore, jury instructions must make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864. If a jury can construe a court's instructions to allow conviction without proof of an element, any resulting conviction violates due process. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

A manifest error affecting a constitutional right may be raised for the first time on review.²⁷ RAP 2.5(a)(3). An appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *Lamar*, 180 Wn.2d at 583. The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *O’Hara*, 167 Wn.2d at 100.

B. The “to convict” instruction relieved the prosecution of its obligation to prove ordinary negligence, an essential element of vehicular assault committed by means of intoxicated driving.

Due process prohibits a trial judge from instructing jurors in a manner that relieves the state of its burden of proof. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the court’s

²⁷ In addition, the court may accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

elements instruction as a complete statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed.²⁸ *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Vehicular assault, when committed by means of driving under the influence, is not a strict liability crime. *State v. Lovelace*, 77 Wn. App. 916, 919, 895 P.2d 10 (1995); *State v. McAllister*, 60 Wn. App. 654, 659, 806 P.2d 772 (1991) *abrogated on other grounds by State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005). Instead, the prosecution must prove beyond a reasonable doubt that the intoxicated driver’s ordinary negligence injured or killed another person. *Lovelace*, 77 Wn. App. at 919; *McAllister*, 60 Wn. App. at 659.²⁹

Here, the court’s “to convict” instruction did not require proof of ordinary negligence. CP 149. This omission was a manifest error affecting Ms. Johnson’s Sixth and Fourteenth Amendment rights to due process and to a jury trial. Accordingly, the error can be raised for the first time on review. *Lamar*, 180 Wn.2d at 583.

²⁸ This is so even if the missing element is supplied by other instructions. *Id*; *Lorenz*, 152 Wn.2d 22 at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

²⁹ The vehicular assault and vehicular homicide statutes were amended in 1996 and 2001. Laws 1996, Ch. 199 §§ 7-8; Laws 2001, Ch. 300 §1. In enacting these amendments, the legislature is presumed to have known about the *Lovelace* and *McAllister* decisions. *In re Wheeler*, 188 Wn. App. 613, 621, 354 P.3d 950 (2015). The amendments did not alter the state’s burden to prove ordinary negligence. Laws 1996, Ch. 199 §§ 7-8; Laws 2001, Ch. 300 §1.

The error requires reversal of Ms. Johnson’s vehicular assault conviction.³⁰ *Smith*, 131 Wn.2d at 263.

Constitutional error is presumed prejudicial, and the state must show harmlessness beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). The prosecution cannot show harmlessness in this case.

Conviction was improper if Ms. Johnson drove with adequate care. It was up to the jury to determine whether or not Ms. Johnson took her eyes off the road to retrieve a burning cigarette, as she told Detective Luque. It was also up to the jury to determine whether or not this action qualified as ordinary negligence.³¹ A jury could conclude that a “reasonably careful” driver would take her eyes off the straight stretch of road described here in order to retrieve a burning cigarette. Accordingly, the state cannot show harmlessness beyond a reasonable doubt. *Id.*

Ms. Johnson’s vehicular assault conviction must be reversed and the case remanded. *Id.* On retrial, the court must instruct jurors that

³⁰ The improper instructions created manifest error affecting Ms. Johnson’s right to due process. The issue can be addressed for the first time on review. RAP 2.5(a)(3). Furthermore, the court should review the error even if it does not qualify under RAP 2.5(a)(3). *Russell*, 171 Wn.2d at 122.

³¹ Ordinary negligence is defined as “the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances.” 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 90.05 (3d Ed).

conviction of vehicular assault by means of intoxicated driving requires proof of ordinary negligence. *McAllister*, 60 Wn. App. at 659

IV. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF VEHICULAR ASSAULT.

A. Standard of Review.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Pittman*, 185 Wn. App. 614, 619, 341 P.3d 1024 (2015). Such a challenge may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). When the challenge comes after a verdict, the reviewing court construes the document liberally. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.* at 162. If the Information is deficient, the court must presume prejudice and reverse. *Id.* at 163.

B. The state failed to allege that Ms. Johnson was negligent, an essential element of vehicular assault by means of intoxicated driving.

A criminal defendant has a constitutional right to be fully informed of the charge she faces. This right stems from the Fifth, Sixth, and Fourteenth Amendments to the federal constitution, as well as art. I, §§ 3 and 22 of the Washington constitution. The right to a constitutionally-

sufficient Information is one that must be “zealously guarded.” *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

All of the essential elements of a crime must be alleged in the charging document. *Zillyette*, 178 Wn.2d at 161-163. An Information that omits an essential element fails to charge a crime. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012).

To obtain a conviction for vehicular assault, the state must prove ordinary negligence. *Lovelace*, 77 Wn. App. at 919; *McAllister*, 60 Wn. App. at 659. Ordinary negligence is an essential element which must be alleged in the charging document.

The Information here did not allege that Ms. Johnson was negligent. CP 114. It was therefore insufficient to charge vehicular assault. *Lovelace*, 77 Wn. App. at 919. The conviction in count one must be reversed and the charge dismissed without prejudice. *Zillyette*, 178 Wn.2d at 163.

V. THE PROSECUTOR IMPROPERLY TOLD JURORS TO DRAW NEGATIVE INFERENCES FROM MS. JOHNSON’ EXERCISE OF HER CONSTITUTIONAL RIGHTS.

A. Standard of Review

Prosecutorial misconduct may be raised for the first time on review if it involves a direct constitutional violation.³² See, e.g., *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011); *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979). Such misconduct requires reversal unless the state shows it is harmless beyond a reasonable doubt. *Monday*, 171 Wn.2d at 680; see also *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

B. The prosecutor impermissibly asked jurors to draw adverse inferences from Ms. Johnson’ exercise of her right to remain silent, her right to a jury trial, and her due process right to have the state prove the elements of each charge beyond a reasonable doubt.

The government may not draw adverse inferences from the exercise of a constitutional right. *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). Here, the prosecutor told jurors to draw adverse inferences from Ms. Johnson’ failure to concede guilt on the possession charge:

³² Ordinarily, a defendant who fails to object to misconduct must show “that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice.” *In re Restraint of Glasmann*, 175 Wn.2d 696, 704, 206 P.3d 673 (2012).

So it appears that Defense is conceding that the Defendant committed the crime of bail jump. If they're willing to concede that[,] the meth possession is so -- even so much clearer than that. Why can't he then -- why can't they concede that? I mean is there any doubt, not just reasonable doubt, is there any doubt that the methamphetamine belonged to her? Was in her purse? That she possessed it? No. And Defense didn't even concede that and ask you weigh that. So that should clue you in on where the Defense is coming from.

RP 1019.

Although Ms. Johnson did not object, the misconduct can be reviewed for the first time on appeal, and requires reversal under either the constitutional harmless error standard or the ordinary standard for prosecutorial misconduct.

1. The misconduct involved two direct constitutional violations.

The prosecutor's argument—that jurors should distrust the defense based on counsel's failure to concede guilt—was a direct comment on Ms. Johnson's right to remain silent,³³ since conceding guilt would mean waiving the privilege against self-incrimination and making further admissions as to that charge. *Cf. Easter* and *Fricks*.

It was also a direct comment on Ms. Johnson's Sixth and Fourteenth Amendment rights to a jury trial and to due process. She chose to exercise her right to trial and to have the state prove the elements of the

³³ This is so because defense counsel speaks for the accused person. *See, e.g., State v. Garland*, 169 Wn. App. 869, 885, 282 P.3d 1137 (2012) (allowing impeachment of defendant's testimony with counsel's opening statement from a prior trial).

offense beyond a reasonable doubt. The state asked jurors to penalize her for exercising those rights.

Because the misconduct involved direct constitutional violations, it may be raised for the first time on appeal. *Monday*, 171 Wn.2d at 680. The constitutional standard for harmless error applies. *Id.*; *see also Fricks*, 91 Wn.2d at 397; *Easter*, 130 Wn.2d at 242. Reversal is required because the state cannot show harmlessness beyond a reasonable doubt. The evidence on the issue of impairment was far from overwhelming, and the prosecutor's misconduct was directed at sowing distrust generally against the defense and defense counsel. RP 1019.

2. The misconduct was also flagrant and ill-intentioned.

The prosecutor's misconduct could not have been cured by an instruction. The prosecutor's insinuation was like a bell that "once rung cannot be unring." *Easter*, 130 Wn.2d at 238-239 (quoting *State v. Trickel*, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)). The prosecuting attorney planted the idea that they could not trust Ms. Johnson and her lawyer when it came to the vehicular assault charge because of the failure to concede guilt on a charge that was "even so much clearer than" the bail jump charge. RP 1019.

To establish prejudice, the defendant must "show a substantial likelihood that the misconduct affected the jury verdict." *Glasmann*, 175

Wn.2d at 704. Prosecutorial misconduct may require reversal even where ample evidence supports the jury's verdict. *Glasmann*, 175 Wn.2d at 711-12. The focus of the reviewing court's inquiry "must be on the misconduct and its impact." *Glasmann*, 175 Wn.2d at 711. Prosecutorial misconduct during argument can be particularly prejudicial. *Glasmann*, 175 Wn.2d at 706.

Here, the state presented very little evidence of impairment. The only direct evidence came from Luque; however, his opinion testimony was undermined by his failure to conduct the twelve-step drug recognition protocol and by Gosch's observation that Ms. Johnson showed no signs of impairment. RP 248, 250, 265-267, 494. The prosecutor criticized defense counsel for attacking the investigation and Luque's opinion, and asked jurors to disregard the defense arguments. RP 1019-1020.

Jurors had to decide whether or not to trust defense counsel's arguments regarding Luque's opinion testimony.³⁴ The prosecutor's misconduct unfairly suggested that Ms. Johnson's exercise of her constitutional rights undermined her defense.

By seeking to penalize Ms. Johnson for asserting her constitutional rights, the prosecutor committed misconduct that was flagrant and ill-

³⁴ This is especially true, given the trial court's refusal to allow cross-examination or instruction on the *Baity* principles. RP 808-813, 917-925.

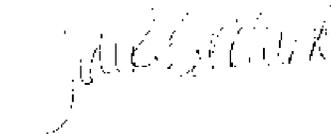
intentioned. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Her vehicular assault conviction must be reversed and the case remanded for a new trial.³⁵ *Glasmann*, 175 Wn.2d at 703-04.

CONCLUSION

Ms. Johnson's convictions for drug possession and vehicular must be reversed. Her blood test results and the methamphetamine found in her purse must be suppressed. The drug charge must be dismissed with prejudice, and the vehicular assault charge must be remanded for a new trial.

Respectfully submitted on October 20, 2015,

BACKLUND AND MISTRY



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³⁵ Although the misconduct also affected the possession charge, the evidence of unlawful possession was overwhelming. Accordingly, the misconduct was harmless beyond a reasonable doubt as to that charge.

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Shaun Johnson, DOC #801018
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

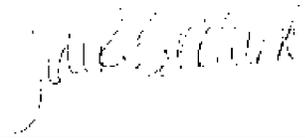
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 20, 2015.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

October 20, 2015 - 2:56 PM

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