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

STATE OF WASHINGTON,

Respondent,

vs.

JOSE MORALES

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jose Morales asks this court to accept review of the decision in Part B of this motion.

B. DECISION

Petitioner Jose Morales seeks review of that portion of the Court of Appeals, Division II published decision filed January 5, 2010, affirming his convictions for vehicular assault and driving under the influence, holding that admission of the blood test was proper, and that even if improper, the admission was harmless error. A copy of the opinion of the Court of Appeals is attached (Bridgewater, J., dissenting in part and concurring in part).

C. ISSUES PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE STATE HAD PROVEN THAT THE STATUTORY SPECIAL EVIDENCE WARNING UNDER RCW 46.20.308 WAS READ TO MR. MORALES?

a. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE STANDARD OF PROOF FOR DETERMINING WHETHER A SUSPECT RECEIVED THE SPECIAL EVIDENCE WARNING IS PREPONDERANCE OF THE EVIDENCE?

b. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE STATE PROVED, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE SPECIAL EVIDENCE WARNING WAS READ TO MR. MORALES, AND THEREFORE STATE V. TURPIN DID NOT APPLY?

II. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE EVEN IF THE SPECIAL EVIDENCE WARNING WAS NOT READ, THE DEFENDANT MUST PROVE HE SUFFERED PREJUDICE BEFORE SUPPRESSION OF THE TEST IS REQUIRED?

III. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT EVEN IF SUPPRESSION OF THE BLOOD TEST WAS REQUIRED, THE ERRONEOUS ADMISSION OF THE BLOOD TEST WAS HARMLESS ERROR AND MR. MORALES IS THEREFORE NOT ENTITLED TO REVERSAL?

D. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Lewis County Prosecuting Attorney charged Jose Morales by Fourth Amended Information with Count I: Hit and Run—Injury; Count II: Vehicular Assault; and Count III: Driving Under the Influence. CP 2-3. A fourth count on that Information, Count IV: Driving While License Suspended in the First Degree was dismissed the morning of trial. CP 3, Report of Proceedings Vol. I. Mr. Morales was found guilty of each count. CP 26-29. Mr. Morales received a standard range sentence. CP 35. Mr. Morales filed a timely appeal and the Court of Appeals, Division II, affirmed his conviction in a published opinion, with one dissenting opinion, and denied his appeal in all respects. See Opinion of the Court of Appeals, attached.

II. FACTUAL HISTORY

On November 3rd, 2004, Mr. Jose Morales was involved in a traffic collision on SR 507 in Lewis County. RP Vol. I, p. 5.¹ After the collision, Mr. Morales continued without stopping to give the required information and stopped about a mile away from the collision scene on SR 507, where he was detained by William Oberg. RP Vol. II, p. 127, 154. Mr. Oberg, along with his brother Robin, had been driving southbound on SR 507 when he passed a car going the other direction that was heavily damaged with the hood sticking up in front of the windshield and steam coming from the engine compartment. RP Vol. II, p. 154. There was a lone male driver. RP Vol. II, p. 156.

Upon detaining Mr. Morales, Mr. Oberg, a retired police officer, did not notice any odor of alcohol on Mr. Morales. RP Vol. II, p. 160. Eventually Trooper Thornburg arrived and immediately handcuffed Mr. Morales. RP Vol. II, p. 167.

Trooper Thornburg claimed that he smelled an “obvious” odor of intoxicants and that Mr. Morales’ eyes were bloodshot and watery. RP Vol. II, p. 168-69. Thornburg asked Mr. Morales if he had been drinking and Mr. Morales said he had consumed one beer. RP Vol. II, p. 170.

Thornburg arrested Mr. Morales for hit and run and searched his person

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

incident to arrest. RP Vol. I, p. 62, Vol. II, p. 173. Thornburg found a set of keys and a Washington State ID card. RP Vol. I, p. 62. After Mr. Morales was transported from the scene by an ambulance, Thornburg searched his car and found two full beer bottles and one full beer can, as well as two empty cans. RP Vol. I, p. 62, Vol. II, p. 173. Thornburg saw, prior to entering the car to search it, two beer cans on the right front seat of the car. RP Vol. I, p. 67. From his vantage point outside the car he couldn't tell if the cans were opened or closed. RP Vol. I, p. 67.

Thornburg testified that Mr. Morales' car was impounded and that they do inventory searches of impounded vehicles as a standard practice. RP Vol. II, p. 70. The impoundment occurred after the initial search of the car, which Trooper Thornburg believed to be a search incident to arrest. RP Vol. II, p. 70, 100.

Marilyn Robertson, age 67, was driving along SR 507 with her 79 year-old mother, Nancy Gunn, in a Dodge Spirit. RP Vol. II, p. 115-16, 189-90. She was driving about forty miles per hour. RP Vol. II, p. 131. The speed limit was thirty-five miles per hour. RP Vol. II, p. 119. As Ms. Robertson was coming around the curve near Big Hanaford Road, she saw Mr. Morales' car come through the stop sign at Big Hanaford Road. RP Vol. II, p. 118-19. She believed that Mr. Morales did not stop at the stop sign, but said he was driving slowly. RP Vol. II, p. 119.

Trooper Brunstad went to the scene of Mr. Morales' arrest. RP Vol. II, p. 201. He also claimed to smell an odor of intoxicants on Mr. Morales and to have noticed bloodshot and watery eyes. RP Vol. II, p. 201. At the hospital, Trooper Brunstad solicited the help of a Spanish interpreter who worked at the emergency room. RP Vol. II, p. 207. However, the State did not call the interpreter to testify at trial and never identified him. Report of Proceedings, Vol. II. As such, the court disallowed testimony from Trooper Brunstad about Mr. Morales' statements, as it was required to do under *State v. Garcia-Trujillo*, 89 Wn.App. 203, 948 P.2d 390 (1997). RP Vol. II, p. 99. Defense counsel objected to the admission of Mr. Morales' blood test because the only evidence regarding the special evidence warning was that Trooper Brunstad handed the warning to the interpreter, and listened as the interpreter spoke in a language he didn't understand. RP Vol. II, p. 207, 220, 244. The special evidence warning, which purportedly contained Mr. Morales' signature, was not offered into evidence by the State. RP Vol. II, p. 245. Trooper Brunstad does not speak Spanish and had no idea what the interpreter said to Mr. Morales. RP Vol. II, p. 220.

The court ruled that the blood test was admissible because there is no requirement whatsoever that the special evidence warning be read to a defendant under arrest for vehicular assault. RP Vol. II, p. 252-255. The

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

The Court of Appeals held that the trial court erred in holding that the special evidence warning is not required; but held the test was nevertheless admissible because: (1) The State must only prove by a preponderance of the evidence that the special evidence warning was read; (2) The State had met this burden because the defendant failed to controvert the evidence that the interpreter read something, out loud, to Mr. Morales, and Mr. Morales failed to testify that he did not understand the words emitted by the interpreter; (3) Even assuming the warning was not read (either in whole or in part), the defendant bears the burden of showing prejudice and no such prejudice was shown because "a blood alcohol test maintains its probative value despite any variance in administering the special statutory notice," (Court's Opinion at 14, citation omitted); (4) The exclusionary rule in *State v. Turpin*, 94 Wn.2d 820, 620 P.2d 990 (1980) does not apply because *Turpin* is limited to cases where the special evidence warning is not given at all, and Mr. Morales received his special evidence warning based on Trooper Brunstad's testimony and Mr. Morales' failure to rebut the State's assertion that the unknown interpreter, whom Brunstad could not understand, read the warning to Mr. Morales in a language he could understand; and (5) Even assuming *Turpin*

required exclusion of the breath test, the trial court's failure to exclude the blood test was harmless error. See Opinion of the Court of Appeals, pgs. 9-17.

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

E. ARGUMENT

I. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE STATE HAD PROVEN THAT THE STATUTORY SPECIAL EVIDENCE WARNING UNDER RCW 46.20.308 WAS READ TO MR. MORALES?

Mr. Morales asserted in the Court below, and reasserts here, that State failed to prove that Trooper Brunstad read the special evidence warning to him, and that as such he was not advised of his right to seek independent testing by a qualified person of his own choosing. Trooper Brunstad, despite claiming that Mr. Morales was able to understand

English, sought out an interpreter at the emergency room to read the special evidence warning to Mr. Morales. (Mr. Morales, it should be emphasized, required the assistance of an interpreter at trial). However, the State failed to present the interpreter to testify at trial, and to date has offered no excuse for this failure. Nevertheless, the Court of Appeals held that Trooper Brunstad's testimony that he read the special evidence warning to this unidentified person, and that person then spoke what seemed to be Spanish to Mr. Morales² (although Trooper Brunstad does not speak Spanish and had no idea what words were uttered), satisfied the State's burden to prove that the special evidence warning was read to Mr. Morales.

a. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE STANDARD OF PROOF FOR DETERMINING WHETHER A SUSPECT RECEIVED THE SPECIAL EVIDENCE WARNING IS PREPONDERANCE OF THE EVIDENCE?

The Court of Appeals held that the standard for determining whether the special evidence warning was actually read to the defendant should be preponderance of the evidence. See Opinion at pg. 11. In so doing, the Court relied on two cases arising from Department of Licensing suspension actions, *O'Neill v. Dep. of Licensing*, 62 Wn.App. 112, 116, 813 P. 2d 166 (1991) and *Rockwell v. Dep. of Licensing*, 94 Wn.App. 531,

² Mr. Morales objected to this testimony at trial as hearsay, and the objection was overruled.

535, 972 P.2d 1276, *review denied*, 138 Wn.2d 1022 (1999). Neither of these cases dealt with the issue presented in this case, nor were they criminal law cases. Further, reliance on these non-analogous cases was unnecessary, as the answer to this question is provided by *State v. Turpin*, *supra*. It may be tempting to view this issue as one of first impression. After all, the inquiry is normally very simple: Was the special evidence warning read or not? Because this case is slightly different factually, however, the Court of Appeals brought needless complication to a straightforward issue. Mr. Morales argues that by failing to produce *any evidence* about the words that were actually read to Mr. Morales, beyond Trooper Brunstad's assertion that it sounded like Spanish, the State failed to prove that the warning was read to him either actually or constructively. The rules needn't be so complicated: The government is required to administer the special evidence warning to a person under arrest for vehicular assault, and the government *must* demonstrate at trial that the warning was read. See *Turpin* at 826. Failure to do so requires suppression of the blood test. *Id.* In cases where the defendant speaks a foreign language and the government relies on an interpreter (whether certified or not) to read the special evidence warning, the government must present, at trial, testimony from the interpreter that he or she read the special evidence warning to the defendant in a language he understands.

If the State fails to take this simple step, it should be viewed as a constructive failure to administer the warning. Here, the Court of Appeals erred in focusing on the subjective, namely that an unidentified person read something to Mr. Morales that sounded like Spanish to someone who speaks *no* Spanish. Applying the rule set forth in *Turpin*, as the Court of Appeals should have done, the State did not prove that the special evidence warning was read to Mr. Morales and his conviction for vehicular assault by (1) operating a motor vehicle while driving under the influence and (2) operating the vehicle in a reckless manner (upon which the State relied heavily, if not almost exclusively, on the .12 blood alcohol result) should be reversed and he should be resentenced only for vehicular assault by disregard for the safety of others.³ Further, his conviction for driving under the influence should be reversed and he should be granted a new trial.

b. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE STATE PROVED, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE SPECIAL EVIDENCE WARNING WAS READ TO MR. MORALES, AND THEREFORE STATE V. TURPIN DID NOT APPLY?

Assuming the Court of Appeals was correct in holding that the State need only prove by a preponderance of the evidence that the special

³ Mr. Morales does not challenge the sufficiency of the evidence to prove vehicular assault by disregard for the safety of others, nor did he at the Court of Appeals.

evidence warning was read, the Court of Appeals erred in holding that the State met this burden. As noted by the dissenting opinion below, the State failed to call the interpreter to testify at trial, or to even identify the interpreter. Who was this “interpreter?” Did he or she possess any state certifications for interpreting Spanish? Was Spanish his or her native language? Does this person speak a regional dialect that may not be understandable to all Spanish speaking persons (i.e. Mixteco, Trice)? Did the interpreter read the warning word for word or paraphrase? Why did the State fail to produce at trial the special evidence warning form which purportedly bears Mr. Morales’ signature? See RP Vol. II, p. 245. Last, and most importantly, why did the State fail to produce this critical witness for trial? It is quite troubling that the State has never proffered a reason for its failure to produce this witness for trial.

In excusing what can only be viewed, based on the paucity of the record, the inexcusable neglect of the State in failing to produce the interpreter for trial, the Court of Appeals instead shifted the burden of proof to Mr. Morales, holding that his failure to express confusion about the warnings satisfied the State’s burden to prove the warnings were read to him in a language he understands. (See Opinion at pg. 8, “Conversely, nothing in the record suggests that the interpreter failed to translate the special statutory notice form accurately or that Morales did not understand

what the interpreter read to him. This *uncontroverted* evidence is sufficient to establish that Morales received his special statutory notice[.]”)

It should be noted, first, that the only way that Mr. Morales could have controverted the State’s evidence on this point was to testify and present evidence, neither of which he was required to do. Mr. Morales was not asserting an affirmative defense here; he was holding to the State to its burden of proving him guilty beyond a reasonable doubt. He had no duty to controvert this evidence because RCW 46.20.308 places the burden of proving the special evidence warning was administered squarely on the State, as does this Court’s holding in *Turpin*. The State was not required to seek admission of this blood test; it *chose* to do so. RCW 46.20.308 does not provide that these tests are per se admissible unless the defendant proves (by some unknown standard of proof) that the test *should not* be admitted.

The Court of Appeals relied heavily in its opinion on Mr. Morales’ failure to rebut the State’s evidence that the special evidence warning was read to him. See Opinion at pgs. 8, 11, 15.⁴ However, failure to rebut otherwise insufficient evidence does not make that evidence sufficient.

⁴ In its opinion, the Court of Appeals made repeated reference to Mr. Morales having signed the special evidence warning form, as though this were fact. The State did not produce this form at trial and appellate counsel has never seen it. It was not an exhibit. Nor did the State make any effort to supplement the record on appeal with this form.

How could Mr. Morales have known whether the special evidence warning was read to him correctly if he couldn't read it himself? If the interpreter butchered the warning, how would he know? And how, also, could Trooper Brunstad know if he doesn't speak Spanish? How can we be sure that the interpreter didn't say to Mr. Morales, "Hey, this officer has the right to make you take a blood test. If you resist, you'll just make it harder on yourself. So don't resist, okay? Just submit to the test and he'll let you go home. You won't have any problems. I promise." The evidence presented by the State just as strongly supports the inference that the latter was said as it does that he was read the statutory special evidence warning.

The State failed to prove, even under a preponderance of the evidence standard, that the statutory special evidence warning was read to Mr. Morales. The Court of Appeals erred.

II. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT THE EVEN IF THE SPECIAL EVIDENCE WARNING WAS NOT READ, THE DEFENDANT MUST PROVE HE SUFFERED PREJUDICE BEFORE SUPPRESSION OF THE TEST IS REQUIRED?

The Court of Appeals, again relying on a non-criminal Department of Licensing case, held that even if the special evidence warning was not read to Mr. Morales accurately, or at all, he must nevertheless demonstrate that he suffered prejudice. Curiously, the Court then goes on to State that

prejudice cannot be demonstrated, as a matter of law, because “a blood alcohol test maintains its probative value despite any variance in administering the special statutory notice.” See Opinion at pg. 14. The Court of Appeals erred. Neither *State v. Turpin*, supra, nor *State v. Anderson*, 80 Wn.App. 384, 909 P.2d 945 (1996), requires the defendant to prove that he was prejudiced by admission of the blood test before the suppression remedy can be sought. *Turpin* states:

The State cannot be allowed to use evidence which the defendant is unable to rebut because she was not apprised of her right to independent testing. Evidence obtained unlawfully is excluded...and the taking of Ms. Turpin’s blood without informing her of her right to seek alternative testing violated RCW 46.20.308 (1). Exclusion is the appropriate remedy for violation of defendant’s statutory rights.

Turpin at 826-27, internal citations omitted. Mr. Morales was not required to demonstrate prejudice, and the Court of Appeals erred.

III. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT EVEN IF SUPPRESSION OF THE BLOOD TEST WAS REQUIRED, THE ERRONEOUS ADMISSION OF THE BLOOD TEST WAS HARMLESS ERROR AND MR. MORALES IS THEREFORE NOT ENTITLED TO REVERSAL?

Mr. Morales urges this Court to adopt the reasoning of Judge Bridgewater, in his dissenting opinion, when he stated:

I also disagree with the majority’s holding that failure to give a special evidentiary warning is subject to harmless error analysis. Under *Turpin*, the appropriate remedy is exclusion of the blood alcohol test results. *State v. Anderson*, 80 Wn.App. 384, 388, 909

P.2d 945 (1996). The *Turpin* court reversed Turpin's conviction and remanded the case for a new trial in which the blood alcohol test would be excluded. *Turpin*, 94 Wn.2d at 827. The *Anderson* court also remanded for further proceedings. *Anderson*, 80 Wn.App. at 384; see also *State v. Holcomb*, 31 Wn.App. 398, 401, 642 P.2d 407 (1982) (holding that failure to advise defendant of his right to have additional tests performed requires reversal).

See Dissenting Opinion at pg. 29, Bridgewater, J. Mr. Morales asks this Court to grant review of this issue and to hold that harmless error analysis is not available where a blood test that was obtained in violation of RCW 46.20.308 was admitted as evidence at trial. Further, the error is not harmless in Mr. Morales' case because there was not sufficient independent evidence upon which to support his verdict of guilty for vehicular assault by driving under the influence or recklessness, or the verdict of guilty for driving under the influence. Because the blood alcohol test result was .12, it cannot be said within reasonable probabilities that the error in admitting the blood test did not materially affect the outcome of the trial. Mr. Oberg, a retired police officer, testified that he did not detect an odor of alcohol on Mr. Morales. Mr. Morales said he had one beer, which was consistent with the Trooper's finding that there was an empty can of beer on the front passenger seat and a full one. The other car involved in this collision was speeding. No physical field sobriety tests were performed. Judge Bridgewater argued in his dissenting opinion that while the evidence tends to support a finding that Mr. Morales was

under the influence, this evidence is “not so overwhelming as to overcome the erroneous admission of Morales’ blood alcohol test of .12.” Mr. Morales agreed and respectfully asks this Court to find that the erroneous admission of the blood test is not subject to harmless error analysis, and that even if it were the error in this particular case is not harmless.

F. CONSIDERATIONS GOVERNING REVIEW

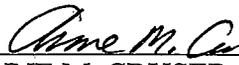
Review of this case should be granted under RAP 13.4 (b) (1) because the opinion of the Court of Appeals is in conflict the decision of the Supreme Court in *State v. Turpin*, 94 Wn.2d 820, 620 P.2d 990 (1980), under (b) (2) because the opinion of the Court of Appeals is in conflict with Division I of the Court of Appeals’ decision in *State v. Anderson*, 80 Wn.App. 384, 909 P.2d 945 (1996), and under (b) (4) because the petition involves an issue of substantial public interest that should determined by the Supreme Court.

G. CONCLUSION

This Court should accept review of Mr. Morales’ petition and hold that the Court of Appeals erred when it held that the State must only prove by a preponderance of the evidence that the statutory special evidence warning was read, that the State met that burden of proof in this case, that a defendant must demonstrate prejudice before he can seek suppression of a blood test obtained in violation of RCW 46.20.308, and that the

admission of a blood test in violation of RCW 46.20.308 is subject to
harmless error analysis.

RESPECTFULLY SUBMITTED this 2nd day of February, 2010.



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Attorney for Mr. Morales

APPENDIX

RCW 46.20.308

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility or where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506(5). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW **46.61.502** or **46.61.504**.

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW **46.61.520** or vehicular assault as provided in RCW **46.61.522**, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW **46.61.502**, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

(4) Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW **46.61.506**, and the person shall be deemed to have received the warnings required under subsection (2) of this section.

(5) If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

(6) If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the person's blood or breath is administered and the test results indicate that

the alcohol concentration of the person's breath or blood is 0.08 or more if the person is age twenty-one or over, or 0.02 or more if the person is under the age of twenty-one, or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (7) of this section;

(b) Serve notice in writing on the person on behalf of the department of his or her right to a hearing, specifying the steps he or she must take to obtain a hearing as provided by subsection (8) of this section;

(c) Mark the person's Washington state driver's license or permit to drive, if any, in a manner authorized by the department;

(d) Serve notice in writing that the marked license or permit, if any, is a temporary license that is valid for sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or until the suspension, revocation, or denial of the person's license, permit, or privilege to drive is sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first. No temporary license is valid to any greater degree than the license or permit that it replaces; and

(e) Immediately notify the department of the arrest and transmit to the department within seventy-two hours, except as delayed as the result of a blood test, a sworn report or report under a declaration authorized by RCW **9A.72.085** that states:

(i) That the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one years and had been driving or was in actual physical control of a motor vehicle while having

an alcohol concentration in violation of RCW **46.61.503**;

(ii) That after receipt of the warnings required by subsection (2) of this section the person refused to submit to a test of his or her blood or breath, or a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person is age twenty-one or over, or was 0.02 or more if the person is under the age of twenty-one; and

(iii) Any other information that the director may require by rule.

(7) The department of licensing, upon the receipt of a sworn report or report under a declaration authorized by RCW **9A.72.085** under subsection (6)(e) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive or any nonresident operating privilege, as provided in RCW **46.20.3101**, such suspension, revocation, or denial to be effective beginning sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or when sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first.

(8) A person receiving notification under subsection (6)(b) of this section may, within thirty days after the notice has been given, request in writing a formal hearing before the department. The person shall pay a fee of two hundred dollars as part of the request. If the request is mailed, it must be postmarked within thirty days after receipt of the notification. Upon timely receipt of such a request for a formal hearing, including receipt of the required two hundred dollar fee, the department shall afford the person an opportunity for a hearing. The department may waive the required two hundred dollar fee if the person is an indigent as defined in RCW **10.101.010**. Except as otherwise provided in this section, the hearing is subject to and shall be scheduled and conducted in accordance with RCW **46.20.329** and **46.20.332**. The hearing shall be conducted in the county of the arrest, except that all or part of the hearing may, at the discretion of the department, be conducted by telephone or other electronic means. The hearing shall be held within sixty days following the arrest or following the date notice has been given in the event notice is given by the department following a blood test, unless otherwise agreed to by the department and the person, in which case the action by the department shall be stayed, and any valid temporary license marked under subsection (6)(c) of this section extended, if the person is otherwise eligible for licensing. For the purposes of this section, the scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe

the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration of 0.02 or more if the person was under the age of twenty-one, whether the person was placed under arrest, and (a) whether the person refused to submit to the test or tests upon request of the officer after having been informed that such refusal would result in the revocation of the person's license, permit, or privilege to drive, or (b) if a test or tests were administered, whether the applicable requirements of this section were satisfied before the administration of the test or tests, whether the person submitted to the test or tests, or whether a test was administered without express consent as permitted under this section, and whether the test or tests indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person was age twenty-one or over at the time of the arrest, or 0.02 or more if the person was under the age of twenty-one at the time of the arrest. The sworn report or report under a declaration authorized by RCW

9A.72.085 submitted by a law enforcement officer is prima facie evidence

that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or the person had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration of 0.02 or more and was under the age of twenty-one and that the officer complied with the requirements of this section.

A hearing officer shall conduct the hearing, may issue subpoenas for the attendance of witnesses and the production of documents, and shall administer oaths to witnesses. The hearing officer shall not issue a subpoena for the attendance of a witness at the request of the person unless the request is accompanied by the fee required by RCW **5.56.010** for a witness in district court. The sworn report or report under a declaration authorized by RCW **9A.72.085** of the law enforcement officer and any other evidence accompanying the report shall be admissible without further

evidentiary foundation and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation. The person may be represented by counsel, may question witnesses, may present evidence, and may testify. The department shall order that the suspension, revocation, or denial either be rescinded or sustained.

(9) If the suspension, revocation, or denial is sustained after such a hearing, the person whose license, privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction. Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW **46.20.334**, RALJ 1.1, or other statutes or rules referencing de novo review, the appeal shall be limited to a review of the record of the administrative hearing. The appellant must pay the costs associated with obtaining the record of the hearing before the hearing officer. The filing of the appeal does not stay the effective date of the suspension, revocation, or denial. A petition filed under this subsection must include the petitioner's grounds for requesting review. Upon granting petitioner's request for review, the court shall review the department's final order of suspension, revocation, or denial as expeditiously as possible. The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings. The decision of the superior court must be in writing and filed in the clerk's office with the other papers in the case. The court shall state the reasons for the decision. If judicial relief is sought for a stay or other temporary remedy from the department's action, the court shall not grant such relief unless the court finds that the appellant is likely to prevail in the appeal and that without a stay the appellant will suffer irreparable injury. If the court stays the suspension, revocation, or denial it may impose conditions on such stay.

(10) (a) If a person whose driver's license, permit, or privilege to drive has been or will be suspended, revoked, or denied under subsection (7) of

this section, other than as a result of a breath or blood test refusal, and who has not committed an offense for which he or she was granted a deferred prosecution under chapter **10.05** RCW, petitions a court for a deferred prosecution on criminal charges arising out of the arrest for which action has been or will be taken under subsection (7) of this section, or notifies the department of licensing of the intent to seek such a deferred prosecution, then the license suspension or revocation shall be stayed pending entry of the deferred prosecution. The stay shall not be longer than one hundred fifty days after the date charges are filed, or two years after the date of the arrest, whichever time period is shorter. If the court stays the suspension, revocation, or denial, it may impose conditions on such stay. If the person is otherwise eligible for licensing, the department shall issue a temporary license, or extend any valid temporary license marked under subsection (6) of this section, for the period of the stay. If a deferred prosecution treatment plan is not recommended in the report made under RCW **10.05.050**, or if treatment is rejected by the court, or if the person declines to accept an offered treatment plan, or if the person violates any condition imposed by the court, then the court shall immediately direct the department to cancel the stay and any temporary marked license or extension of a temporary license issued under this subsection.

(b) A suspension, revocation, or denial imposed under this section, other than as a result of a breath or blood test refusal, shall be stayed if the person is accepted for deferred prosecution as provided in chapter **10.05** RCW for the incident upon which the suspension, revocation, or denial is based. If the deferred prosecution is terminated, the stay shall be lifted and the suspension, revocation, or denial reinstated. If the deferred prosecution is completed, the stay shall be lifted and the suspension, revocation, or denial canceled.

(c) The provisions of (b) of this subsection relating to a stay of a suspension, revocation, or denial and the cancellation of any suspension, revocation, or denial do not apply to the suspension, revocation, denial, or disqualification of a person's commercial driver's license or privilege to operate a commercial motor vehicle.

(11) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, revoked, or denied, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he or she has a license.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOSE MATILDE MORALES,

Appellant.

No. 36941-9-II

PUBLISHED OPINION

Hunt, J. — Jose Matilde Morales appeals his jury convictions for vehicular assault and driving under the influence. He argues that (1) the trial court erroneously admitted his blood alcohol test results because the State failed to show that he was advised of his statutory right to an independent blood test under RCW 46.20.308(2);¹ (2) the trial court erroneously admitted beer containers found during an allegedly illegal search of his vehicle; and (3) the evidence was insufficient to establish that he operated his motor vehicle under the influence of intoxicants and that he operated his vehicle in a reckless manner. We affirm.

¹ Although the legislature has amended this statute several times since the date of Morales's offense, the relevant language has not changed. *Compare* former RCW 46.20.308(2), (3) (2004) *with* RCW 46.20.308(2), (3). Accordingly, we cite the current version of the statute.

FACTS

I. Hit and Run

On November 3, 2004, Marilyn Robertson drove her elderly mother north on Highway 507 toward Bucoda, Washington. As she drove around a curve at approximately 35 to 40 mph, Robertson observed Morales's vehicle approaching a stop sign where a side road intersected with Highway 507. Although it was daylight and the intersection was in an open and visible area, Morales made no attempt to stop. Instead, he drove through the stop sign into Robertson's lane of travel, apparently at about 15 miles per hour.²

Robertson, whose right-of-way lane of travel had no stop sign at that intersection, swerved to avoid Morales, but she could not prevent his colliding with her car. The collision's impact spun Robertson's car around, forced it into a ditch, and severed Morales's front bumper from his vehicle. Morales stopped momentarily and then drove away; he did not return to the accident scene. As a result of the collision, Robertson suffered injuries to her knees, shoulders, neck, and forehead. Her mother suffered a fractured ankle and a twisted foot.

A. Arrest for DUI³

Shortly after the accident, retired police officer William Oberg and his brother were driving south on Highway 507 when they passed a heavily damaged vehicle driving in the opposite direction; its hood was sticking up and steam was coming from its engine. As they

² Morales's trial counsel noted this approximate speed during closing argument.

³ Driving under the influence.

continued driving, they came upon Robertson's vehicle in the ditch. On learning about the hit and run collision, Oberg turned around and drove back with his brother to look for the damaged vehicle that they had passed earlier. Oberg found the damaged car on the side of the road approximately one mile from the accident scene.

Oberg observed Morales exit the vehicle, and detained him while his (Oberg's) brother called for assistance. When Oberg told Morales, in English, that he should have stayed at the accident scene, Morales stated, in English, "I don't care about the people in the accident." 2 Verbatim Report of Proceedings (VRP) at 158. Morales also threatened both Oberg brothers.

Washington State Trooper Todd Thornburg arrived, conversed with Morales in English, and experienced no language barrier. Morales appeared to understand the trooper's questions, gave no indication that he did not understand, and provided intelligible answers in English. Morales told the trooper that he had been headed to Tenino when someone pulled out in front of him, that he (Morales) was the driver and the only occupant of his vehicle, and that he had consumed one beer before driving.

During his contact with Morales, Thornburg observed that Morales emitted an "obvious odor of intoxicants" and that his eyes were watery and bloodshot. 2 VRP at 174. Thornburg arrested Morales for driving under the influence of alcohol and for hit and run and read him his *Miranda*⁴ rights in English. Morales responded verbally, in English, that he understood his rights. Before an ambulance took Morales to the hospital, Thornburg searched Morales incident to his arrest and found an identification card and two keys.

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Washington State Trooper Terry Brunstad also spoke with Morales at the site where Oberg had detained him. Brunstad similarly noticed that Morales's eyes were bloodshot and watery, that Morales's pupils were constricted, and that Morales smelled of alcohol.

B. Search of Vehicle

After Morales left in the ambulance, Thornburg searched Morales's vehicle. From outside the car, Thornburg saw two beer cans on the right front seat, but he could not tell whether they were open. Once inside the vehicle, he smelled intoxicants, and found a total of five beer containers—the two beer cans on the front passenger seat, one full and one empty; and two full beer bottles and one empty beer can behind the driver's seat.

Thornburg inserted into the ignition one of the keys that he had found on Morales. The key fit and unlocked the ignition, but the damage sustained during the collision prevented the engine from starting. Thornburg then impounded Morales's vehicle and inventoried the items found inside, as is common practice for troopers in this situation. The police later matched Morales's rear license plate with the license plate on the front bumper left behind at the accident scene.

C. Blood Draw at Hospital

Meanwhile, Washington State Trooper Robert Huss remained at the collision scene. Emergency personnel told him that Robertson's mother had suffered a fractured right ankle. Huss used his radio to inform Thornburg about the fracture. Thornburg informed Brunstad that they would be processing Morales for vehicular assault. Brunstad then followed Morales to the hospital to conduct a mandatory blood draw under RCW 46.20.308(3).

When Brunstad arrived at the hospital, he contacted a Spanish/English interpreter who worked in the emergency room to provide Spanish translation for Morales.⁵ Brunstad gave the Spanish interpreter forms from which to read Morales his *Miranda* rights and the special statutory notice⁶ informing the arrestee of his right to an independent blood alcohol test.⁷ Morales asked no clarifying questions during or after hearing the interpreter read to him from the forms in Spanish; nor did he appear unable to understand what he heard. On the contrary, Morales signed Brunstad's forms, indicating that he understood his constitutional rights and the special statutory notice of his right to an independent blood test.

Brunstad then asked Morales approximately 30 DUI interview questions: Brunstad read the questions in English and the interpreter restated them in Spanish. Morales's translated responses were appropriate to the questions asked, suggesting that the translator was accurately translating the questions and Morales's responses.

II. Procedure

The State charged Morales with hit and run with an injury,⁸ vehicular assault,⁹ driving under the influence,¹⁰ and first degree driving while license suspended (DWLS).

⁵ The record does not show what precipitated the contact with an interpreter.

⁶ RCW 46.20.308(2).

⁷ Brunstad did not personally read the special notice to Morales in English. Instead, he relied on the interpreter to read it to Morales in Spanish.

⁸ RCW 46.52.020(3).

⁹ RCW 46.61.522(1)(a) or (b) or (c).

¹⁰ RCW 46.61.502(1)(a) or (b).

¹¹ The State later dismissed the fourth count, DWLS.

A. CrR 3.5 Hearing

Morales moved to exclude the statement he had made during his hospital interview with Brunstad, arguing that he had not been properly advised of his constitutional *Miranda* rights before he made these statements. Brunstad, who did not speak Spanish, could not verify exactly what the interpreter had read to Morales in Spanish. The State neither identified the hospital interpreter nor called him to testify. Accordingly, the trial court ruled that the State had failed to prove beyond a reasonable doubt that Morales had understood and knowingly and voluntarily waived his constitutional *Miranda* rights. And the trial court excluded Morales's answers to the 30 DUI interview questions that Brunstad had asked through the interpreter.¹²

B. CrR 3.6 Hearing

During an evidentiary hearing¹³ on the first morning of trial, Morales's counsel moved under CrR 3.6 to suppress the evidence found in Morales's vehicle. He argued that the trooper's search did not fall within the "search incident to arrest" exception to the warrant requirement

¹¹ RCW 46.20.342(1)(a).

¹² The State does not cross-appeal the trial court's exclusion of Morales's DUI interview questions and answers. Thus, the adequacy of Morales's *Miranda* warnings in Spanish is not before us and, therefore, we do not address it.

¹³ Rather than issue written findings of fact and conclusions of law, as CrR 3.6(b) requires, the trial court made detailed oral findings of fact and conclusions of law. Although failure to enter written CrR 3.6 findings and conclusions is error, such error is harmless as long as the trial court's oral findings are sufficient to permit appellate review. *State v. Riley*, 69 Wn. App. 349, 352-53, 848 P.2d 1288 (1993). Both parties assert that the trial court's oral rulings are sufficient for appellate review, and we agree.

because Morales was at the hospital during the vehicle's search and no longer present at the scene. The trial court agreed. Nevertheless, the trial court ruled the beer cans and bottles admissible under a different exception to the warrant requirement—the doctrine of inevitable discovery—based on Thornburg's impounding and inventorying Morales's disabled vehicle left on the roadside.

C. Statutory Notice of Right to Independent Blood Test

At trial, Morales asked the trial court to exclude his blood alcohol test results and the testimony about the special statutory notice, based on the court's earlier exclusion of the DUI interview questions. Morales argued that the blood draw was improper because the State could not show he had received the special statutory notice about his right to independent blood alcohol testing. But Brunstad testified that he had instructed the interpreter to read Morales the special notice form in Spanish and that the interpreter apparently did so. Morales presented no testimony and made no offer of proof that he had not received the special notice or that he did not understand the notice the interpreter read to him.

Engaging in a statutory analysis of RCW 46.20.308, however, the trial court concluded that (1) when a suspect is arrested for vehicular assault or vehicular homicide based on an accident involving serious bodily injury to another, a mandatory blood test is administered, even without the arrestee's consent; and (2) therefore, no special notice about the right to an independent blood test is required.¹⁴ The trial court denied Morales's motion and admitted

¹⁴ Based on this reasoning, the trial court did not address whether Morales had received his special statutory notice about his right to an independent blood alcohol test.

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evidence that his blood draw revealed .12 grams of alcohol per 100 milliliters of blood.

D. Verdict and Sentence

Morales conceded guilt on the hit and run count. The jury found him guilty of all three charges and returned a special verdict for the vehicular assault, finding that Morales had operated a motor vehicle while under the influence of intoxicating liquor, had operated a motor vehicle in a reckless manner, and had operated a motor vehicle with disregard for the safety of others.

Morales appeals.

ANALYSIS

I. Special Statutory Notice of Right to Independent Blood Test

Morales argues that the trial court erred by admitting his blood alcohol test results because (1) the trial court incorrectly ruled that, in light of the compulsory blood draw for vehicular assault, the special statutory notice was not required; and (2) the State failed to prove that he was properly advised of his statutory right to an independent blood alcohol test because it did not present evidence establishing exactly what the interpreter had read to him.

We agree with Morales's first argument—that the trial court was incorrect in ruling the special statutory notice was not required. But this error is not dispositive. The record shows that the trooper handed the special statutory notice form to the interpreter, who then read from the form in Spanish to Morales. Conversely, nothing in the record suggests that the interpreter failed to translate the special statutory notice form accurately or that Morales did not understand what the interpreter read to him. This uncontroverted evidence is sufficient to establish that Morales received his special statutory notice; therefore, Morales's second argument fails.

A. Standards of Review

We review a trial court's evidentiary rulings for abuse of discretion. *State v. Stubsoen*, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). A trial court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). We leave credibility determinations to the trier of fact; such determinations are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We review questions of law de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

B. Statutory Notice of Right to Independent Blood Test

Our legislature has provided that a person arrested for vehicular assault or vehicular homicide may be subjected to a blood test without his consent. RCW 46.20.308(3).¹⁵ The arresting officer, however, must also inform the arrestee of his right to have additional blood tests administered by any qualified person of his choosing. RCW 46.20.308(2).¹⁶ The State's authority

¹⁵ RCW 46.20.308(3) provides in relevant part:

Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

¹⁶ In addition to describing how blood alcohol tests are to be performed and the consequences of a driver's refusal to take a non-mandatory test, RCW 42.20.308(2) provides:

The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified

to compel a blood test under RCW 46.20.308(3) does not negate the independent requirement to inform the arrestee of his right to additional, independent testing. *State v. Turpin*, 94 Wn.2d 820, 823, 620 P.2d 990 (1980). Therefore, the trial court erred in ruling that the statutory notice of the right to independent testing was not required in light of the mandatory nature of the blood draw for Morales's vehicular assault.

Generally, the results of a mandatory blood test are not admissible at trial if the defendant was not advised of his statutory right to an independent blood test. *Turpin*, 94 Wn.2d at 826-27. But here, although the trial court's ruling that the statutory warning was not required is contrary to *Turpin*, this error was not prejudicial because the blood alcohol tests were admissible on other grounds supported by the record. See *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). Here, the uncontroverted record shows that, at Brunstad's behest, the interpreter read the special statutory notice to Morales in compliance with RCW 46.20.308(2). Based on this alternate ground, we affirm the trial court's admission of the blood test results.

C. Proof of Advisement

1. Burden and standard of proof

The special notice informs a defendant of his statutory right to additional testing of his blood sample for possible use as evidence in his own defense. RCW 46.20.308(2). Before the trial court can admit the mandatory blood test as evidence, the State must show that the defendant was given notice of his statutory right to an additional, independent test. *Turpin*, 94 Wn.2d at 823. The remaining question is: What is the standard of proof?

person of his or her choosing as provided in RCW 46.61.506.

Washington courts have held that analogous provisions of the implied consent statute impose a “preponderance of the evidence” standard of proof. For example, RCW 46.20.308(1) allows the arresting officer to administer a breath or blood test where the officer reasonably believes that the defendant drove under the influence of an intoxicating substance; the State must establish such belief by a preponderance of the evidence. *O’Neill v. Dep’t of Licensing*, 62 Wn. App. 112, 116, 813 P.2d 166 (1991). Similarly, before the State can revoke a defendant’s driver’s license under RCW 46.20.308(2)(a) for refusing to submit to a breathalyzer test, the State must prove such refusal by a preponderance of the evidence; failure to meet this burden renders such refusal inadmissible. *Rockwell v. Dep’t of Licensing*, 94 Wn. App. 531, 535, 972 P.2d 1276, review denied, 138 Wn.2d 1022 (1999).

Here, the State proved by a preponderance of the evidence that Morales received notice of his right to independent blood alcohol testing. Brunstad’s uncontroverted testimony established that the interpreter read the special evidence notice to Morales from the form that Brunstad provided to him. The record reflects no problems with the reading of this form and no suggestion that Morales did not understand it. On the contrary, Morales signed the special evidence notice form, indicating that he understood his right to an independent blood test.¹⁷

¹⁷ The record on appeal does not include a copy of this form.

2. Not analogous to *Miranda* warnings

At oral argument, Morales attempted to analogize a failure to give the statutory special evidence warning to a failure to inform a suspect of his constitutional *Miranda* right to remain silent.¹⁸ This analogy does not follow because the constitutional right to remain silent is qualitatively different from the statutory right to an independent blood test. Furthermore, unlike the constitutional right to refuse to answer incriminating questions, a defendant's silence or objection to the legislatively mandated blood test is inconsequential when his arrest for vehicular homicide or vehicular assault rescinds his right to refuse a blood draw. RCW 46.20.803(5).

In *Carranza*, for example, Division III of our court held that (1) a suspect has no *constitutional* right to notice of his statutory entitlement to independent testing of his blood sample, and (2) failure to give a suspect this special notice "does not rise to the level of a constitutional denial of due process." *State v. Carranza*, 24 Wn. App. 311, 315-16, 600 P.2d 701 (1979). As our Supreme Court has acknowledged, this special notice is a statutory right that ensures a suspect's awareness of his right to additional independent testing. *Turpin*, 94 Wn.2d at 824. This statutory right, however, does not impose as demanding a burden of proof on the State as do the constitutional *Miranda* warnings.

Unlike notice of the statutory right to an independent blood test, *Miranda* protects a suspect from making any incriminating statements to police while in custody. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). The State must meet a high standard of proof to

¹⁸ U.S. Const. amend. V; Wash. Const. art. I, § 9.

establish waiver of a defendant's constitutional right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 17 L. Ed. 2d 694 (1966). Benefitting the defendant, the court entertains every reasonable presumption against waiver of constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019 (1938). And the State has the "heavy burden" to prove that a defendant knowingly, intelligently, and voluntarily waived his constitutional right to remain silent. *Miranda*, 384 U.S. at 475. Silence does not constitute waiver for *Miranda* purposes; nor does the defendant's failure to assert his right to remain silent.¹⁹ *Miranda*, 384 U.S. at 475.

A vehicular assault arrestee's statutory right to the special evidence notice, however, does not involve a constitutional right and, therefore, the State is not held to the same high standard of proof. The United States Supreme Court, for example, has held that (1) taking a blood sample and admitting its analysis does not violate a defendant's Fifth Amendment privilege against self-incrimination; (2) blood alcohol content analysis is not "testimonial or communicative" in nature but, rather, constitutes "real or physical evidence"; and (3) the taking of a blood sample is analogous to fingerprinting, photographing, or taking measurements of a suspect, where the suspect/donor's participation is irrelevant to analysis. *Schmerber v. California*, 384 U.S. 757, 761, 764, 765, 86 S. Ct. 1826 (1966). Although the trial court here did not address this less-stringent standard of proof for establishing that Morales had been advised of his statutory right to

¹⁹ In excluding Brunstad's DUI questioning and answers, the trial court reasoned that, because the State offered no evidence about exactly what the interpreter read to Morales in explaining his constitutional right to remain silent, the State failed to meet its burden to show beyond a reasonable doubt that Morales understood and intelligently waived his *Miranda* rights. As we previously noted, however, the State does not cross-appeal this trial court ruling; therefore, its propriety is not before us.

independent testing, it correctly avoided applying the higher *Miranda* burden.

3. No prejudice

Even when an arresting officer uses erroneous language in administering the special evidence warning, exclusion of the subsequently obtained blood-alcohol-test evidence is not required where the defendant suffered no actual prejudice. *Graham v. Dep't of Licensing*, 56 Wn. App. 677, 680, 784 P.2d 1295 (1990).²⁰ Thus, here, even assuming (without accepting) that the interpreter used erroneous language in reading the special statutory notice to Morales, there is no showing of prejudice. Unlike Graham,²¹ Morales asserted no prejudice at trial; nor does he allege prejudice on appeal. And we perceive none, especially where, unlike involuntary or coerced confessions and hearsay,²² a blood alcohol test maintains its probative value despite any variance in administering the special statutory notice. *Schmerber, supra*.

D. Turpin

²⁰ Analogous to Morales's request to exclude his blood alcohol test results, Graham sought exclusion of her refusal to submit to the breathalyzer test from the hearing to revoke her driver's license.

²¹ Graham argued that an error in the special warning about her right to an independent blood test prejudiced her: She contended that (1) the erroneous inclusion of the words "at your own expense," in reference to her right to an independent blood alcohol content test, "created a 'chilling effect' on her decision whether to take the breath test"; and (2) therefore, she had refused to submit to any blood or breath test should have been excluded from the hearing at which the Department of Licensing revoked her driver's license based on such refusal. *Graham*, 56 Wn. App. at 680.

²² Part of the reason for generally excluding hearsay statements is their diminished truth-seeking value resulting from inconsistencies in human perception and memory, which cannot be tested on cross examination when the declarant is not present in court. *Crawford v. Wash.*, 541 U.S. 36, 43, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Morales further contends that the trial court's admission of his blood test results conflicts with the Supreme Court's ruling in *Turpin*. We disagree.

Turpin, like Morales, was at fault in an automobile accident and suspected of driving while intoxicated. *Turpin*, 94 Wn.2d at 821. But Turpin, unlike Morales, did not immediately receive notice of her arrest, the compulsory taking of her blood sample after the officers took her to the hospital, or her right to independent testing.²³ *Turpin*, 94 Wn.2d at 822.

Turpin's arrest for negligent homicide negated her right to refuse a statutorily-required blood test. *Turpin*, 94 Wn.2d at 822. Nevertheless, the record's total silence about any attempt to give Turpin notice of her right to independent blood testing led the Supreme Court to hold that the trial court erred in failing to exclude her compulsory blood test results.²⁴ *Turpin*, 94 Wn.2d at 826-27. Noting that the gravity of the negligent homicide charge increased, rather than precluded, the need to protect Turpin's statutory right to independent blood-alcohol testing, the court held that giving notice of the right to independent testing is mandatory and that failure to give this notice requires exclusion of the State's blood test results. *Turpin*, 94 Wn.2d at 826.

Here, in contrast, there was no similar failure to give Morales notice of his right to independent testing; therefore, the *Turpin* exclusionary rule does not apply. Unlike the silent

²³ During Turpin's treatment for a broken jaw, the officer had informed hospital staff of her arrest and had instructed a nurse to draw a blood sample. *Turpin*, 94 Wn.2d at 822. Not until three days after the incident did officers inform Turpin that soon after the accident, they had taken a blood sample from her at the hospital's emergency room. *Turpin*, 94 Wn.2d at 822. The arresting officer attributed this oversight to his uncertainty about Turpin's physical and emotional condition at the time, even though Turpin had been alert, responsive, and able to understand verbal communications. *Turpin*, 94 Wn.2d at 821.

²⁴ RCW 46.20.308(3).

record in *Turpin*, the record here contains uncontroverted evidence confirming the reading of the special statutory notice to Morales, including notice of his right to independent testing, at the time of the compulsory blood draw. Brunstad testified that (1) he sought assistance from a Spanish/English interpreter employed at the hospital emergency room; (2) he instructed the interpreter to read from forms setting forth both the *Miranda* rights and the special statutory notice, which Brunstad handed to the interpreter; (3) Morales listened while the interpreter read these forms to him in Spanish; and (4) when the interpreter finished reading the forms, Morales signed his name on the forms to show that he understood his constitutional rights and the statutory notice that had been read to him.

Again, nothing in the record controverts Brunstad's testimony that the interpreter read Morales the special statutory notice form that he (Brunstad) had provided and that Morales acknowledged, or that this notice included, notice of his right to independent testing.²⁵ Thus, unlike *Turpin*, the record here shows by a preponderance of the evidence that Morales received the statutory special evidence notice and knew of his right to independent additional testing of his blood sample. Accordingly, *Turpin* does not control.

E. Harmless Error

Even if the trial court erred in admitting the mandatory blood tests, this error is harmless

²⁵ Morales never asserted below and does not assert on appeal that he was not, in fact, read the special evidence notice or that he did not understand it. Furthermore, it appears that even if Morales had any questions, he had sufficient command of English to ask such questions to Brunstad directly. The record shows that Morales had previously competently conversed with the state troopers in English, answered questions appropriately, given no indication that he did not understand the rights read to him, and asked no questions seeking clarification of any of those rights.

because there is sufficient independent evidence that Morales was driving while under the influence of or while affected by alcohol when he ran through the stop sign, crashed into the victim's vehicle, and drove away from the scene in his damaged vehicle. Not only did Morales's act of driving through a stop sign into an approaching car strongly suggest some degree of impairment, but also (1) Thornburg and Brunstad testified that Morales smelled of alcohol and that Morales's eyes were bloodshot when they contacted him soon after the accident; (2) Brunstad also noticed that Morales's pupils were constricted, which Brunstad testified could indicate someone was under the influence of certain types of drugs; (3) officers located two open beers in Morales's vehicle; and (4) Morales's vehicle smelled of alcohol. These facts alone would have allowed any reasonable jury to conclude that Morales had been driving under the influence of alcohol.

II. Vehicle Search

Morales next argues that the trial court erred in admitting beer cans and beer bottles that Thornburg seized during his warrantless search of Morales's vehicle. Morales contends that admitting such evidence violates article 1, section 7 of the Washington State Constitution.²⁶ We affirm the trial court's admission of this evidence, based on the impoundment and subsequent inventory search of Morales's vehicle.

A. Standard of Review

When reviewing denial of a CrR 3.6 motion to suppress, we look for substantial evidence

²⁶ Article I, section 7 of the Washington State Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

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in the record to support the trial court's findings of fact. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). We review the trial court's conclusions of law de novo. *Mendez*, 137 Wn.2d at 214; *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

B. Exceptions to Warrant Requirement

Warrantless searches are per se unreasonable unless they fall within narrowly drawn exceptions.²⁷ *State v. Johnson*, 104 Wn. App. 409, 414, 16 P.3d 680, review denied, 143 Wn.2d 1024 (2001). “[T]he State bears the burden of showing a warrantless search falls within one of these exceptions.” *State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005). “Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, *inventory searches*, plain view, and *Terry*^[28] investigative stops.” *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (emphasis added).

At an impromptu CrR 3.6 hearing, the trial court considered what it regarded as three searches of Morales’s vehicle: (1) Thornburg’s determination that Morales’s key fit the ignition; (2) Thornburg’s observation of two beer cans on the right front passenger seat, before he searched the vehicle; and (3) Thornburg’s discovery of the other beer cans inside the vehicle after he entered the vehicle. The trial court ruled that the vehicle search did not fall under the search “incident to a valid arrest” exception because Morales had been completely removed from the scene and taken to the hospital before the search took place.²⁹ Therefore, the trial court considered other possible exceptions to the warrant requirement.

²⁷ “When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

²⁸ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968).

²⁹ The State does not cross appeal this ruling.

1. Open view

The trial court first ruled that the two beer cans on the front right seat were admissible under the open view exception.³⁰ Morales conceded that he could not win his argument that these two beer cans were inadmissible.

On appeal, Morales focuses his suppression argument on the inevitable discovery rule and the inventory search of his vehicle. He does not challenge admission of these two beer cans under the open view exception or argue that this exception should not apply. Despite asserting that the photo of those two beer cans should not been admitted, he acknowledges in his sufficiency argument that the officer saw these two beer cans from a lawful vantage point. Accordingly, we do not further address this open view issue.

2. Inevitable discovery, impound, and inventory search

The trial court next addressed the search inside the vehicle, where Thornburg found several other beer cans and discovered that Morales's keys fit the damaged ignition, but would not start the vehicle.³¹ The trial court admitted this evidence, reasoning that Thornburg would have inevitably discovered these items when he later impounded and inventoried Morales's vehicle.³²

³⁰ Although the trial court did not articulate the words "open view," it did find that the beer cans could be seen from outside the vehicle looking in. And the trial court ruled them admissible.

³¹ Morales argues that the entire search of the vehicle was illegal because it did not constitute a search incident to his arrest after he was transported to the hospital. But he does not argue on appeal that the trial court erred in applying the inevitable discovery doctrine to the finding that the key (found on his person) fit the ignition of the car.

³² Thornburg testified that troopers conduct inventory searches as a matter of routine when they impound vehicles and that he had impounded Morales's vehicle and inventoried the items he

Under the inevitable discovery doctrine, the State must prove by a preponderance of the evidence that “the police did not act unreasonably or in an attempt to accelerate discovery, and [that] the evidence would have been inevitably discovered under proper and predictable investigatory procedures.” *State v. Avila-Avina*, 99 Wn. App. 9, 17, 991 P.2d 720 (2000); see also *State v. Reyes*, 98 Wn. App. 923, 927-28, 993 P.2d 921 (2000). “[T]he rule allows neither speculation as to whether the evidence would have been discovered, nor speculation as to how it would have been discovered.” *State v. Richman*, 85 Wn. App. 568, 577, 933 P.2d 1088, review denied, 133 Wn.2d 1028 (1997).

While this case was pending before us, our Supreme Court issued *State v. Winterstein*, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 4350257 (No. 80755-8, filed Dec. 3, 2009), which arguably holds that the inevitable discovery doctrine does not apply under article 1, section 7 of the Washington State Constitution. Even assuming that this was the holding in *Winterstein*, and not dicta,³³ *Winterstein* is not dispositive because the evidence here establishes that there was a lawful inventory search that was not in response to the discovery of the beer cans in the back of the car, and we may affirm on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (citing *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003)).

An exception to the exclusionary rule allows law enforcement to conduct a warrantless inventory search following lawful impoundment of a vehicle. *State v. Greenway*, 15 Wn. App.

found inside.

³³ See *Winterstein*, 2009 WL 4350257 at ¶ 45 (J. Johnson, J, concurring).

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216, 218, 547 P.2d 1231, *review denied*, 87 Wn.2d 1009 (1976). Evidence discovered during an inventory search is admissible when “there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of crime.” *State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). RCW 46.55.113(1) authorizes law enforcement to impound a vehicle following the driver’s arrest for DUI.

Here, the facts show not only that the troopers would have inevitably discovered the beer cans in the back of the car during an inventory search following the statutorily authorized impoundment of Morales’s vehicle; but also the facts show that there was an actual lawful inventory search and impoundment that was independent of the trooper’s discovery of the beer in the back of the car. Thornburg lawfully impounded Morales’s vehicle because (1) he had arrested Morales for DUI, RCW 46.55.113(1) (“Whenever the driver of a vehicle is arrested for violation of RCW 46.61.502 [DUI]. . . the vehicle is subject to summary impoundment, pursuant to the terms and conditions of an applicable local ordinance or state agency rule at the direction of a law enforcement officer.”); and (2) he had probable cause to believe that the vehicle had been used in the commission of a felony, vehicular assault, and was, therefore, evidence. *State v. Clark*, 143 Wn.2d 731, 755, 24 P.3d 1006 (2001) (officer may impound vehicle if he has probable cause to believe it was used in the commission of a felony). Thornburg also testified that it was normal police procedure to conduct an inventory search of an impounded vehicle and that such an inventory search took place here. We therefore affirm the trial court’s admission of the beer cans on the back floorboard of Morales’s vehicle following the lawful inventory search.³⁴

III. Sufficiency of Evidence

Morales next argues that, assuming we rule his blood alcohol test results inadmissible, the remaining evidence is insufficient to support (1) the jury's verdict that he operated a motor vehicle under the influence of alcohol, thus, requiring us to reverse his driving under the influence conviction and the special verdict finding that he operated a motor vehicle under the influence of intoxicating liquor; and (2) the jury's special verdict finding that he caused bodily injury to another by driving in a reckless manner. Having held that the trial court did not err when it admitted Morales's blood alcohol test results and the beer can evidence, we review this sufficiency argument based on the entire record. And Morales's challenge fails.

A. Standard of Review

When a defendant challenges the sufficiency of the evidence, we view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). We draw all reasonable inferences in the State's favor. *State v. Sanchez*, 60 Wn. App. 687, 693, 806 P.2d 782 (1991). We consider circumstantial evidence to be equally reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Again, credibility determinations are for the trier of fact and are not subject to our review. *State v. Camarillo*, 115

³⁴ Morales does not challenge the validity of his arrest. Nor does he argue that the troopers should not have impounded his vehicle or challenge the actual inventory that Thornburg performed after impounding the vehicle. Instead, he faults the trial court's admission of the additional beer cans under the inevitable discovery doctrine.

Wn.2d 60, 71, 794 P.2d 850 (1990).

B. Driving Under the Influence

The trial court's "to convict" instruction for driving under the influence required the jury to determine whether: (1) on November 3, 2004, Morales drove a motor vehicle; (2) Morales was *under the influence of or affected by intoxicating liquor* while driving; and (3) the act occurred in Washington. Morales challenges only the second element, driving under the influence. His blood alcohol level of .12 grams of alcohol per 100 milliliters of blood, which was well above the .08 statutory presumptive level, is uncontroverted evidence that he was affected by or under the influence of intoxicating liquor.

His blood alcohol level, however, was not the only evidence of his intoxication. In light of Morales's challenge to the admissibility of his blood test results and his challenge to the jury's special verdict finding that he caused bodily injury to another by driving in a reckless manner, we note the following additional proof of his having operated a motor vehicle under the influence of alcohol.

Thornburg and Brunstad testified that they smelled alcohol on Morales and that his eyes were bloodshot when they contacted him shortly after the accident; Morales told Thornburg that he had consumed one beer; but two beer cans (one full and one empty) were visible on the front passenger seat of Morales's vehicle. And Thornburg could smell an "obvious odor of intoxicants" inside the vehicle. 2 RP at 174. Thornburg's inventory search of Morales's vehicle, which was the instrumentality of the vehicular assault, then revealed a Budweiser beer box behind the driver's seat and some additional beer cans, some of them were also empty.

In addition, Brunstad noticed that Morales's pupils were constricted, which Brunstad testified could indicate that someone was under the influence of certain types of drugs. As further evidence that Morales was affected by alcohol, he had driven through a stop sign at an open and unobstructed intersection, collided with a vehicle that had the right of way, and drove away from the scene in his damaged vehicle, leaving his injured victims and his bumper behind.

We hold that sufficient evidence supports the jury's verdict that Morales operated a motor vehicle while under the influence of or affected by intoxicating liquor, both with and without the blood alcohol test results.

C. Operating a Motor Vehicle in a Reckless Manner

Jury instruction No. 15 stated that "[t]o operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences." CP at 41. The record shows that while under the influence of intoxicating alcohol, Morales failed to stop at a stop sign and drove about 15 miles per hour into oncoming traffic, causing a collision with another vehicle. Thereafter, witnesses saw him drive away from the accident scene in his damaged vehicle. When Oberg later informed Morales that he should have stayed at the scene, Morales responded that he did not "care about the people in the accident." 2 RP at 158.

These facts show that Morales drove his vehicle "in a rash or heedless manner, indifferent to the consequences." *State v. Roggenkamp*, 153 Wn.2d 614, 622, 106 P.3d 196 (2005) (quoting *State v. Bowman*, 57 Wn.2d 266, 271, 356 P.2d 999 (1960)). We hold, therefore, that the evidence is sufficient to support the jury's special verdict finding that Morales operated his vehicle in a reckless manner.

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Affirmed.

Hunt, J.

I concur:

Quinn-Brintnall, J.

Bridgewater, J. (concurring in part, dissenting in part) — Jose Matilde Morales appeals his vehicular assault and driving under the influence convictions. I would hold that Morales's vehicular assault conviction, on the basis of either driving under the influence of intoxicating liquor or driving in a reckless manner prong, cannot stand. Specifically, the State failed to prove that it advised Morales in Spanish of the special evidentiary warnings required by RCW 46.20.308(2); thus the trial court should not have admitted the results of his involuntary blood test. But I would affirm Morales's vehicular assault conviction under the unchallenged prong of operating a vehicle with disregard for the safety of others. In addition, I would remand Morales's vehicular assault charge for resentencing. *See State v. Brown*, 145 Wn. App. 62, 78-79, 184 P.3d 1284 (2008) (different prongs of vehicular assault carry different seriousness levels for sentencing), *review denied*, 165 Wn.2d 1014 (2009). Because the trial court's admission of Morales's blood alcohol test was not harmless error, his conviction for driving under the influence (DUI) also cannot stand. I respectfully concur and dissent.

ANALYSIS

I. Special Evidence Warning

Morales contends that the trial court erred when it admitted the results of his blood alcohol test because the State failed to prove that he received his special evidence warning informing him of his right to additional testing. I dissent from the majority because the State had the burden to prove that it read Morales the special evidence warning and did not meet that burden, even using the lower preponderance of the evidence standard. This court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738

P.2d 306, *review denied*, 108 Wn.2d 1033 (1987).

When the State attempted to introduce Morales's blood alcohol test result, Morales objected because the State had failed to read him the special evidence warning for mandatory blood draws. Morales argued that although the record showed that the interpreter said something to Morales in Spanish, the trooper could not verify what the interpreter said to Morales. Morales acknowledged that the State could have called the interpreter to testify or the State could have presented the form that Morales signed acknowledging the warning, but the State failed to make either showing.

Like the majority, I agree that the State had to prove that it provided Morales with the special evidentiary warning. But I disagree that the State carried its burden to prove that it gave Morales the special evidentiary warning.

The State argues, and the majority agrees, that it proved that the trooper informed Morales of his right to additional testing because the trooper testified that the interpreter translated the warnings and read them to Morales. This is insufficient.

Where police use an interpreter to question a suspect, the questioning officer's testimony of what the interpreter said is admissible only if not offered for the truth of the matter asserted or the interpreter is the suspect's agent. *State v. Gonzalez-Hernandez*, 122 Wn. App. 53, 57, 92 P.3d 789 (2004) (citing *State v. Garcia-Trujillo*, 89 Wn. App. 203, 948 P.2d 390 (1997)).

In *Gonzalez-Hernandez*, the investigating officer used a fellow police officer to help translate an interview with Gonzalez. *Gonzalez-Hernandez*, 122 Wn. App. at 56. During the interview, Gonzalez stated that he was sorry, but the interpreter did not know how to translate

important words like “rape” and “sorry.” *Gonzalez-Hernandez*, 122 Wn. App. at 56. The interpreter also did not know why Gonzalez stated he was sorry. *Gonzalez-Hernandez*, 122 Wn. App. at 56. On rebuttal, the trial court admitted the investigating officer’s testimony that Gonzalez had stated he was sorry but that Gonzalez did not know why he was sorry. *Gonzalez-Hernandez*, 122 Wn. App. at 56-57. We reversed, holding that the translation was unreliable because the State “did not establish what question [the interpreter] asked Gonzalez in Spanish that elicited the answer.” *Gonzalez-Hernandez*, 122 Wn. App. at 59.

In *Garcia-Trujillo*, the trial court excluded an officer’s testimony about what the defendant allegedly stated through an interpreter as inadmissible hearsay. *Garcia-Trujillo*, 89 Wn. App. at 205-06. On appeal, Division One of this court affirmed, holding that the trial court properly excluded the testimony because the interpreter was not the defendant’s agent or authorized to speak for him. *Garcia-Trujillo*, 89 Wn. App. at 208-09. The court held that the error was not harmless because the officer had no way of knowing whether the defendant answered the question the interpreter was supposed to ask. *Garcia-Trujillo*, 89 Wn. App. at 209-10, 211-12.

Here, while testimony showed that Morales had some understanding of English, he required the use of an interpreter during both Trooper Brunstad’s interview and trial. The trooper acknowledged that he did not read the special evidence warning to Morales in English and that he could not verify what the interpreter read to Morales. The record does not reveal that the interpreter told the trooper what he read to Morales. The State did not identify the interpreter or call him to testify. In fact, the trial court excluded Morales’s answers to the DUI questionnaire

because Trooper Brunstad did not know whether the interpreter actually advised Morales of his *Miranda* rights. The State did not include in the record on appeal the document that Morales allegedly signed stating that he understood the special evidence warning or any sworn statement by the trooper. The State offered the trooper's testimony to prove the truth of the matter asserted—that an interpreter read Morales the special evidence warning. The State did not show that the unidentified interpreter was Morales's agent. Trooper Brunstad's testimony was inadmissible hearsay to which Morales objected. The State failed to prove, as required by *State v. Turpin*, 94 Wn.2d 820, 826-27, 620 P.2d 990 (1980), that Trooper Brunstad read Morales the required special evidence warning.

I also disagree with the majority's holding that the failure to give a special evidentiary warning is subject to harmless error analysis. Under *Turpin*, the appropriate remedy is exclusion of the blood alcohol test results. *State v. Anderson*, 80 Wn. App. 384, 388, 909 P.2d 945 (1996). The *Turpin* court reversed Turpin's conviction and remanded the case for a new trial in which the blood alcohol test would be excluded. *Turpin*, 94 Wn.2d at 827. The *Anderson* court also remanded for further proceedings. *Anderson*, 80 Wn. App. at 384; see also *State v. Holcomb*, 31 Wn. App. 398, 401, 642 P.2d 407 (1982) (holding that failure to advise defendant of his right to have additional tests performed requires reversal).

Accordingly, I would hold that the trial court abused its discretion by admitting the blood alcohol test results and reverse Morales's vehicular assault conviction on the first two prongs, operating a vehicle in a reckless manner and driving under the influence. But, Morales did not assign error to his conviction on the third vehicular assault prong, operating a vehicle with

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disregard for the safety of others. I would affirm Morales's conviction for vehicular assault, but on the disregard for the safety of others prong only. And I would remand for resentencing on the vehicular assault count only because conviction under this prong requires a different sentence. *Brown*, 145 Wn. App. at 78-79.

II. Driving Under the Influence

I agree with the majority's holding that sufficient evidence supports Morales's conviction for operating a motor vehicle under the influence of alcohol, but would hold that admission of his blood alcohol results is not harmless error. I would therefore reverse and remand this count.

When reviewing the record below on a sufficiency of the evidence claim, the proper test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). We consider circumstantial evidence as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We leave credibility determinations for the trier of fact and do not review them. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

We review erroneous evidentiary rulings under the nonconstitutional harmless error standard. *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). An erroneous ruling amounts to reversible error if the court determines that within reasonable probabilities, the error materially affected the trial outcome. *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997).

The to-convict jury instruction for driving under the influence required the jury to

determine whether: (1) on November 3, 2004, Morales drove a motor vehicle; (2) that Morales was under the influence of or affected by intoxicating liquor while driving; and (3) that the act occurred in Washington. Morales challenges only the second prong.

Jury instruction 17 provided:

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

It is not unlawful for a person to consume intoxicating liquor and drive a motor vehicle. The law recognizes that a person may have consumed intoxicating liquor and yet not be under the influence of it.

Clerk's Papers (CP) at 43. As stated above, the trial court abused its discretion in admitting the results of Morales's involuntary blood alcohol test. Here, the State took Morales's blood sample several hours after the accident, which revealed a .12 blood alcohol level. RCW 46.61.502 provides:

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:

....
(b) While the person is under the influence of or affected by intoxicating liquor or any drug;

....
(4) Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(b) or (c) of this section.

For the purposes of the driving under the influence conviction two beer cans were visible on the front passenger seat in Morales's vehicle. The search of Morales's vehicle revealed several

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more beer cans, some empty. The interior of the car smelled of intoxicants. As further evidence that Morales was affected by alcohol, he failed to stop at the stop sign, which resulted in the collision from which he then fled. While the evidence tends to support a finding that Morales was under the influence or affected by intoxicating liquor, this evidence is not so overwhelming as to overcome the erroneous admission of Morales's blood alcohol test of .12. Morales's blood alcohol level was per se evidence that Morales drove under the influence of alcohol. RCW 46.61.502(4). I cannot say that admission of this evidence did not affect the trial's outcome. I would remand for retrial of Morales's DUI conviction. *See State v. Wright*, 165 Wn.2d 783, 789, 203 P.3d 1027 (2009) (retrial permitted where conviction vacated for reason other than insufficient evidence).

Bridgewater, J.