NO. 103251-0

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

LOLA FELIPA LUNA,
Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 57943-0-II
Kitsap County Superior Court No. 21-1-00094-18

ANSWER TO PETITION FOR REVIEW

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SERVICE		
	John Kannin john@kanninlaw.com Aaron P. Orheim Aaron@tal-fitzlaw.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 5, 2024, Port Orchard, WA _____ **Original e-filed at the Supreme Court; Copy as at left.** **Office ID #91103 kcpa@kitsap.gov**

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney Randall Sutton.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals unpublished decision in *State v. Lola Felipa Luna*, No. 57943-0-II (Jun. 11, 2024), a copy of which is attached to the petition for review.

III. COUNTERSTATEMENT OF THE ISSUES

Whether Luna fails to show that the Court of Appeals decision should be reviewed where:

The Court of Appeals properly concluded that Luna's claims regarding the mall fight and her age were not preserved and that, alternatively, the trial court properly admitted the mall fight evidence as res gestae evidence;

The trial court's exclusion of inadmissible evidence did

not violate Luna's right to present a defense because Luna's proffered social media exhibits that were lacking in a proper foundation and/or relevance and the trial court properly excluded evidence of SPT's intoxication where there was no evidence Luna was aware she was drunk;

The Court of Appeals, in conformance with well-established precedent properly concluded that the erroneous admission of certain ER 404(b) evidence was harmless;

The trial court properly admitted Luna's voluntary post-Miranda statements to police where it properly found that Luna had waived her *Miranda* rights; and

The Court of Appeals correctly concluded, in an issue raised for the first time on appeal, that a statute enacted after Luna gave her statement could not logically be construed to bar the admission of that statement?

IV. STATEMENT OF THE CASE

The Court of Appeals set forth the facts and trial procedure in its opinion:

> I. BACKGROUND & UNDERLYING CRIME
>
> A. Background Leading up to the Fight
>
> Prior to the day of the fight, SPT and Luna had never met in person. The two had only communicated on social media. Luna and SPT had mutual connections, including another teenaged girl, HD. In August 2020, five months before the fight between Luna and SPT, Luna and HD got into a physical fight at the Kitsap shopping mall (the mall fight). HD testified at trial that the fight between her and Luna occurred over "drama about a boy," because HD had become "really close with [Luna's] ex-boyfriend." 2 Verbatim Rep. of Proc. (VRP) at 448. Luna testified that the fight occurred because Luna heard through mutual friends that HD was "talking about [her]." 4 VRP at 1224. Luna also testified that she and HD reconciled and became cordial again after the fight.
>
> SPT and HD were close friends; HD saw SPT as an older sister figure. On the day of the fight, SPT told HD that she wanted to fight Luna. According to HD, the fight between HD and Luna was only part of why SPT wanted to fight Luna. HD testified that Luna and SPT "had drama," but she could not recall what it was about, specifically. 2 VRP at 456-57. SPT told HD to send Luna a message saying that HD wanted to fight her and asking for her address. Luna responded and

provided HD with her address. HD testified that when Luna provided HD with her address, Luna was unaware that HD was communicating with SPT and that Luna did not know that SPT planned to go to Luna's house to fight her.

B. The Fight & SPT's Death

SPT received Luna's address from HD and traveled to Luna's house. SPT was accompanied by two of her friends, JO and KN. SPT's infant daughter was also in the car. According to JO, when they arrived at Luna's house, she got out of the car and accompanied SPT to the sidewalk in front of Luna's house. Luna's house sits above the sidewalk; a flight of approximately 13 stairs separates the fenced-in front yard from the sidewalk. SPT went up the stairs but JO remained on the sidewalk below. JO observed the fight from below. Luna's stepdad and boyfriend were also present and stood outside observing the fight. Luna's boyfriend videotaped the fight.

The fight itself spanned for approximately 30 seconds. The video shows Luna holding a knife slightly behind her while having a heated conversation with SPT. Eventually, SPT took the first swing and then Luna and SPT exchanged punches and hit each other repeatedly. The two eventually separate and as she started to walk away, back to the car where her friends were waiting, SPT exclaimed, "What the [f***] is wrong with you? Girl, what the [f***]?" Ex. 103, at 48 sec. The video captured Luna's boyfriend behind the camera stating "She just stabbed her." *Id*., at 49 sec.

SPT walked away from Luna's house, back

to the street where JO and KN were waiting for her with the car. According to JO, SPT did not look good when she reached them and "[t]here was just a lot of blood." 2 VRP at 233. KN and JO called 911 while driving SPT to the hospital. During the call, KN and the operator discussed the car's location in relation to the hospital and KN shared overarching details about the fight between Luna and SPT that lead to SPT's injuries. KN shared the following details with the operator: ". . . and she got stabbed pretty bad . . . in the face, in the stomach in the back." Ex. 97, at 23 sec. Either JO or KN can be heard pleading with SPT, saying "[SPT, SPT, SPT, SPT] come on stay awake [SPT] come on." *Id.*, at 2 min., 1 sec. KN and JO are clearly shaken up but they remain relatively calm on the phone. Someone can be heard breathing heavily and someone can be heard crying in the background.

It took the group roughly five minutes to drive to the nearby hospital. However, the emergency room at the local hospital had recently shut down, and it only had an urgent care center. As such, when the girls arrived at the hospital, SPT did not receive treatment immediately and an ambulance was called. A police officer arrived to the hospital parking lot before the ambulance and began taking photos of SPT's injuries while she laid down in the car. Approximately three minutes later, the ambulance arrived and began administering care.

SPT received medical care from the team of EMTs that arrived at the local hospital in the ambulance. The medics administered epinephrine

as well as ketamine. It became clear that SPT was in critical condition and needed to be airlifted to the trauma center at Harborview Medical Center in Seattle. The medics transferred SPT to the flight team, who continued providing care and also administered epinephrine. The team at Harborview was prepared and waiting for SPT's arrival and sprang into action to attempt to stabilize her as soon as the helicopter arrived.

Despite the ongoing efforts from medical personnel, SPT was declared dead at 3:27 PM. At the time of her death, the attending doctor made the presumed finding that she died of hemorrhagic shock, meaning that she bled to death. The medical examiner who performed the autopsy on SPT testified that she suffered 24 sharp force wounds. At the time of her death, SPT had stab wounds on her face, her neck, her chest, her arm, and her back.

Officer Hoyson of the Bremerton Police Department responded to Luna's house after the fight. When Hoyson arrived at the house Luna's stepdad answered the door, and Luna came to the door to speak to Hoyson. Hoyson noticed that Luna had cuts on her hands. Luna told Hoyson that she had learned someone was coming to her house to fight her, and that during the fight she stabbed the other party. At the time of this statement Luna was not free to leave but had not been told that she was being detained.

Following this statement, Hoyson arrested Luna. Officer Hoyson handcuffed and read Luna her Fifth Amendment rights, as well as the juvenile warning. Luna told Hoyson that she understood her

rights. The officers then took Luna to the police station, where she was again advised of her Fifth Amendment rights and interviewed by Detective Martin Garland in an interrogation room. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

II. PROCEDURE AND TRIAL

Luna was charged by amended information with one count of murder in the first degree and two counts of murder in the second degree (one count charging intentional murder and one count charging felony murder based on the underlying felony of assault in the second degree).

Prior to trial, the court held an ER 404(b) hearing and a CrR 3.5 hearing. The trial court found that Luna's statements were made voluntarily and after Luna waived her *Miranda* rights.

The interview was video recorded and then admitted and played for the jury. Luna objected to the admission of her statements made to the police following her arrest.

The case proceeded to trial and several witnesses to the fight and the events leading up to the fight testified for the State consistent with the facts outlined above.

During Luna's interview with Detective Garland, she told Garland that SPT did not overpower her during the fight. Luna also told him that she stopped stabbing SPT because she became too tired and worn out to continue stabbing SPT. Detective Garland believed that Luna did not know, at the time of the interview, whether SPT

was still alive.

During the interview, Luna contradicted HD's version of events leading up the mall fight. She explained to Detective Garland that HD had been speaking disrespectfully about Luna's brother, who helped raised Luna. Luna said she was feeling protective and that's why she fought with HD. She claimed that on the day of her fight with SPT, she did not want to fight HD, or anyone else for that matter. Luna said that she and HD had already settled their drama and become friends again so she was confused as to why HD was texting her asking to fight. She told Garland that she kept the pocket knife with her for self-defense, because there was a group of girls that wanted to "jump" her, and it made her particularly nervous that a group of people showed up at her house wanting to fight her. Ex. 102, at 2 min., 10 sec.

Luna asserted that she stabbed SPT in self-defense. Luna testified that she was afraid of SPT. The day before the fight, Luna said that HD sent her messages on Snapchat to arrange a place for HD and Luna to fight. Luna declined HD's invitation to fight. The next morning, the day of the fight, HD messaged Luna again asking to fight. Luna told HD that HD could come to Luna's house. She said, "I didn't genuinely think that [HD] was going to come to my house or that there was -- anything bad was going to happen. I thought all it would take was us talking and figuring out what the issue was and how to solve that." 4 VRP at 1318-19.

HD did not come to Luna's house, but SPT did. Luna testified that every time she walked

> outside of her house, she brought her pocketknife with her. In explaining why, she said that she brings it "[f]or multiple reasons. Opening stuff, . . . like packages with tape and stuff. If I were to get into a situation where I needed to use something to protect myself, then I would have that on me at the time." *Id.* at 1320. Luna testified that she was surprised to see SPT walk through her front gate. When Luna and SPT first started talking, Luna testified that she had the pocketknife in her pocket. Luna testified that as SPT got closer and, according to Luna, became more aggressive in her posturing, Luna took out her pocketknife and slipped it behind her back. Luna claimed that she was afraid that SPT was going to hurt her. She also testified that she did not retreat into the house as things escalated because she was afraid that SPT would attack her from behind. Luna testified that she used her knife because SPT started choking her. Luna claimed that at the time, she was not aware whether her knife was making contact with SPT during the fight. Luna testified that she could not tell whether using the knife had any effect on SPT.
>
> The jury found Luna guilty of murder in the second degree with a deadly weapon enhancement and she was sentenced to 168 months in prison.

CP 2-7 (footnotes omitted); *see also* Brief of Respondent at 1-23.

V. ARGUMENT

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should decline to accept review because Luna has failed to show that any of these considerations supports acceptance of review.

A. THE COURT OF APPEALS PROPERLY CONCLUDED THAT LUNA'S CLAIMS REGARDING THE MALL FIGHT AND HER AGE WERE NOT PRESERVED AND THAT THE TRIAL COURT PROPERLY ADMITTED THE MALL FIGHT EVIDENCE.

As a prefatory note, Luna contends that "One-Sided ER

404 Rulings" denied her a fair trial. Petition at 8. This hyperbole is simply not supported by the record at trial or in the opinion below.

Before trial, the State proposed the admission of seven items of evidence pursuant to ER 404(b):

(1) A TikTok video of a fight involving Luna and HD in a mall. CP 36; Exh. 100.

(2) Krystal Winkelman's statement that two weeks earlier, she had witnessed Luna arm herself with a large kitchen knife in preparation for a fight. CP 37.

(3) A TikTok video Luna posted in which she stabbed at the camera with a large knife with a superimposed legend that read "once those purge sirens go off I know exactly what girls house im going to."[1] CP 38; Exh 99.

[1] "The Purge" is a film and multiple sequels in which "the country is a dystopia which observes an annual event known as 'the Purge,' in which all crime, including murder, is decriminalized for a 12-hour period." *https://en.wikipedia.org/wiki/The_Purge* (viewed Aug. 30,

(4) Instagram messages Luna posted regarding stabbing including: on January 10, 2021, "the stabbing energy has never left (loudly crying face emoji). I do wtf I want when tf I wanttt." CP 39; and a group chat on an unknown date in which Luna stated "ill stab all y'all." CP 41.

(5) A text message in which Luna told another girl she "ill stab that hoe lmao." CP 44.

(6) A TikTok message Luna sent to another user in which she stated "tell me you have 'options' and im stabbing you and all ur options." CP 46.

(7) An Instagram post depicting Luna and her stepfather, wearing medical masks for the pandemic, "flipping off" the camera with their middle fingers extended. Luna's caption reads, "after all the crime shows i watch, murder seems so easy to get away with like how do they get caught are they that lazy." CP 46-47.

2023); *see also* 3RP 977-78.

The trial court ruled after hearing extensive argument from the parties. RP (9/9) 3-40. It ruled the mall fight video (Exh. 100) was admissible as part of the res gestae of the crime. RP (9/19) 41.

It ruled that the Purge video (Exh. 99), Instagram Post 1 ("stabbing energy"), and the texts regarding stabbing (offers of proof 5, 6 & 7) were relevant to show Luna's intent and state of mind, and that were more probative than prejudicial. RP (9/19) 42-44. The court reserved ruling on the second Instagram post unless more information could be provided as to when it occurred. RP (9/19) 43. When it was later offered at trial as Exhibit 91, based on testimony that it had been posted on November 3, 2020, Luna did not object. 3RP 966-67.

The court excluded Winkelman's proposed testimony on the grounds that it was more prejudicial than probative under ER 403. RP (9/19) 41. The court also rejected the argument that any of the proposed evidence was admissible to show a

common scheme or plan. RP (9/19) 42, 44.

On appeal, the Court of Appeals further held that "the trial court erred in admitting 'the Purge video' and the 'stabbing energy' comment under ER 404(b)." Plainly neither the trial nor appellate court issued one-sided rulings.

1. Luna fails to seriously address the primary holding of the Court of Appeals: that her present claims were not preserved for review.

Luna argues that the conclusion of the Court of Appeals that trial court properly admitting evidence of her attack on HD in the mall as res gestae evidence "creates untenable conflicts." Petition at 9. But she did not raise this issue the trial court. Although the Court of Appeals primarily held that the issue was not preserved, she does not seriously address that holding.

The primary holding of the Court of Appeals on the mall fight video, that her claim had not been raised in the trial court:

> But Luna did not object to HD testifying about the fight on the grounds that it was irrelevant or would violate ER 404(b). In the trial court, Luna limited her 404(b) and relevancy objection to the

> *video* of the fight. As it relates to HD's testimony, Luna lodged hearsay, foundation, and "asked and answered" objections, but she did not argue that evidence of the fight, writ large, was inadmissible as improper evidence of other bad acts or irrelevant due to the passage of time. 2 VRP at 449, 451-52, 454. Because objecting to evidence in the trial court on one ground does not preserve an objection on appeal based on any or all *other* grounds, we decline to consider Luna's argument as it relates to the broader evidence of the mall fight and confine our analysis to the *video* of the fight. *See* RAP 2.5(a); *State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007); *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Opinion at 12. Yet in her petition she again argues that the "[*t*]*estimony* about the mall fight with another girl six months prior was not admissible." Petition at 10 (emphasis supplied).

The Court of Appeals also rejected her challenge to the video itself as unpreserved.

> With respect to the admission of the video particularly, Luna argues in her brief that the video was unduly prejudicial because it was "set to inflammatory music with violent lyrics" and because HD's testimony about the fight was sufficient to alert the jury that there had been a prior conflict between HD and SPT, rendering the video unnecessary. Br. of Appellant at 42. But Luna did not make this argument in the trial court

> below. Luna's written response to the State's motion to admit ER 404(b) evidence focused primarily on case law and did not parse out the many different items of evidence the State sought to admit. The mall video is not mentioned at all in the written memorandum beyond it being lumped in with the other ER 404(b) evidence that Luna generally objected to on the ground that it did not show Luna's motive or intent to stab SPT. To the extent that Luna now argues that the mall video was unduly prejudicial because it was set to "inflammatory music," this argument is raised for the first time on appeal. *Id.*

Opinion at 12.

Despite the clear holding that these arguments were not preserved for review, Luna does not seriously address preservation in her petition. Although she briefly argues that the issues were preserved, it is notable that she cites to nowhere in the report of proceedings of the lengthy ER 404(b) hearing where she raised the claims pressed on appeal. A review of that transcript does not show that she did. *See* RP (9/19) 3-40. She cites to her pre-hearing brief. Petition at 18 (*citing* CP 73, 71-82, 122-26). The initial cited document does not so much as mention the video. The second document only mentions it in

passing while listing the evidence the State sought to admit. CP 123. At no point did she specifically raise the claims presented on appeal. Given that the opinion is unpublished and lacks precedential value, and given that the issues she raises in this Court was held unpreserved below, no "untenable conflict" exists and review should be denied.

2. The Court of Appeals correctly held that the mall fight video was properly admitted as res gestae evidence.

Even were the claim limited to the issue addressed in the alternative[2] by the Court of Appeals, Luna would fail to show a conflict justifying review. Her formulaic reading of the res gestae rule provides an inadequate analysis of both the evidence in question and Washington precedent. Because the mall attack was the event that set in motion the series of events leading to Luna stabbing SPT to death, it was clearly directly relevant and admissible.

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[2] Opinion at 13 ("Even assuming we should consider this particular argument for the first time on appeal").

Historically, the res gestae rule was seen as exception to ER 404(b). *State v. Sullivan*, 18 Wn. App. 2d 225, 235, 491 P.3d 176 (2021) (*citing* Karl B. Tegland, 5 *Wash. Prac*., § 404.18, at 527 (6th ed. 2016), *and State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969 (2004)), *review denied,* 198 Wn.2d 1037 (2022). More recently, the Court of Appeals has clarified that "res gestae evidence more appropriately falls within ER 401's definition of 'relevant' evidence, which is generally admissible under ER 402, rather than an exception to propensity evidence under ER 404(b)." . *Sullivan*, 18 Wn. App. 2d at 236 (*quoting State v. Dillon*, 12 Wn. App. 2d 133, 148, 456 P.3d 1199 (internal quotation omitted), *review denied*, 195 Wn.2d 1022 (2020)). Thus, "evidence that completes the story of the crime charged *or* provides immediate context for events close in both time and place to that crime is not subject to the requirements of ER 404(b)." *Sullivan*, 18 Wn. App. 2d at 237 (emphasis supplied). Such evidence is not of *other* misconduct of the type addressed in ER 404(b). *Id.* (*citing State v. Grier*,

168 Wn. App. 635, 647, 278 P.3d 225 (2012)).

Luna argues only the second of the alternative bases for admitting res gestae evidence: that it provide immediate context close in time and place to the crime. Thus, she contends, an assault that occurred four months earlier is not res gestae evidence.

She ignores, however, the other language in the precedent, which, as emphasized above, is in the disjunctive: evidence that completes the story of the crime charged. *See*, *e.g.*, *State v. Crossguns*, 199 Wn.2d 282, 296, 505 P.3d 529 (2022) (evidence that defendant had sexually abuse victim for a year prior to charged incident admissible as res gestae); *State v. Goheen-Rengo*, 5 Wn. App. 2d 1020, 2018 WL 4583593, *6 (2018)[3] (evidence of history of Department of Children Youth and Families involvement with defendant and his children for over a year prior to offense relevant to charge of unlawful

[3] Unpublished; *see* GR 14.1(a).

imprisonment of CYF social workers).

Here, the mall altercation is what precipitated the events that led to the stabbing. Without it, why HD would purportedly be coming over for a "rematch" would make no sense. Nor would SPT's actions make sense without the background of the assault by Luna on her "sister." In short without the mall fight evidence, the entire crime would appear to the jury in a vacuum. It was therefore highly relevant and properly admitted under ER 401 and ER 402.

3. Luna's claim that the evidence was inadmissible due to her age was not preserved below.

Luna next claims that under *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and similar cases that the mall fight evidence was also inadmissible. This creative claim was not raised at trial and was inadequately briefed in the Court of Appeals and should not be considered now.[4] The Court of Appeals rejected this claim as inadequately

[4] Luna now makes passing reference that suggesting this novel

briefed and unpreserved:

> Relying on cases dealing with juvenile sentencing, Luna argues for the first time on appeal that because of her age, the trial court abused its discretion in admitting evidence of the mall fight because of the impetuosity of juveniles and their diminished ability to appreciate consequences. The State asks us not to consider this new claim for the first time on appeal. Because Luna cites no cases suggesting that a trial court must consider the mitigating qualities of youth when deciding whether to admit evidence, this argument was not sufficiently developed below and we decline to consider this issue for the first time in this appeal. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000).

Opinion at 14 n.4. Because this conclusion is neither contrary to any precedent nor remedied with any citation to controlling authority in the present petition, this Court should decline to consider this issue.

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issue was preserved because she referred to herself as a "teenage girl" in her trial brief. Petition at 18. But that was certainly not presented to the trial court as something it should consider in light of *Miller*.

B. THE TRIAL COURT'S EXCLUSION OF INADMISSIBLE EVIDENCE DID NOT VIOLATE LUNA'S RIGHT TO PRESENT A DEFENSE.

A criminal defendant has a constitutional right to present relevant, admissible evidence in his defense. *State v. Rehak,* 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied,* 120 Wn .2d 1022, *cert. denied,* 508 U.S. 953 (1993). However, "a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. *State v. Maupin,* 128 Wn.2d 918, 925, 913 P.2d 808 (1996) (quoting *State v. Hudlow,* 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible." ER 402. The right of a criminal defendant to present evidence is not unfettered and the refusal to admit evidence lies largely within the trial court's sound discretion. *Rehak,* 67 Wn. App. at 162.

Luna fails to show any abuse of discretion at trial or error on the part of the Court of Appeals.

1. The trial court did not abuse its discretion in excluding Luna's proffered social media exhibits.

Luna first faults the trial court for excluding certain social media posts. The trial court did not abuse its discretion.

The trial court carefully considered Luna's proposed exhibits. 4RP 1154-93. Contrary to the implication in her brief, it admitted a number of them:[5]

Exhibit 160, in which Luna liked SPT's posts. 4RP 1167.

Exhibit 161A, in which SPT purportedly "adopted" a post in which another person said, "don't let me get mad, i'll fuck up the energy. ain't nobody having fun." 4RP 1172.

Exhibit 161B, in which SPT posted "I'm finna ruin this bitch life real quick brb." And "**Me, 3 hours in a

[5] Luna also implied that the court admitted all the State's proposed exhibits, which is simply untrue. Brief of Appellant at 53; *see* RP (9/19) 41.

relationship** “I don’t think I can do this anymore.” 4RP 1173.

Exhibit 161F, in which SPT posted, “& my older sisters” in response to post that said “Disrespecting my sister ***** would not recommend. i’ll fuck you up.” 4RP 1179.

Exhibit 161G, in which SPT posted, that she got a scar on her knee “Fighting at Walmart.” 4RP 1180.

Exhibit 161I, in SPT posted a gif and commented “I will beat ur ass.” 4RP 1184.

Exhibit 161L, which contained a number of SPT’s posts that Luna interpreted to mean “I want to fight you. Here’s my address. That’s what she leaves it at. This whole conversation results in this, that [SPT] wants to fight this girl and is going to send her her address to do that.” 4RP 1190-91.

The court found the remaining exhibits Luna identifies in her brief were insufficiently probative:

Exhibit 159 was a picture of SPT standing with a beer, which the court found was not probative of anything. 4RP

1155. Luna does not offer any explanation in her brief showing this exhibit was relevant.

Exhibit 161D, which was SPT's re-post of a meme that said "My family needs a cousins only retreat. No aunties and uncles. Just straight ignorance and illegal activities" was excluded because it "It is simply not specific enough. Illegal activities is straight -- it's not admissible under the rule of relevance." 4RP 1177.

Exhibit 161E was another meme SPT posted showing some cartoon women with the caption ""You had all that mouth when I was pregnant, bitch wassup???!!" The court excluded it on grounds of relevance and under ER 403. 4RP 1178.

Exhibit 161H, was someone else's post that SPT shared. It showed three pictures of gloves, with the original poster's caption "gucci gloves" to which someone else responded, "i want to murder my husband in these." The court declined to admit it because it was unclear which sentiment SPT was

endorsing, and further because whatever relevance was "far outweighed by the prejudicial effect." 4RP 1182.

Exhibit 161K was post by SPT:

> Bitch I'll send my whole address & me Nd tum work an go to school so wtf is u talking about. Bc the nigga sell weed off our accounts? Chill bitch chill & I know for a fact your wit the net talk bc never have you pulled up never have you got shit cracking me an my sister straight tho thanks for worrying bout us

The court found it had "marginal relevance" but because it did not talk about any specific acts of violence and talked about selling weed, it would be confusing to the jury and any probative value was "far outweighed" by the prejudicial effect. 4RP 1189.

Exhibit162, showing four individuals allegedly making a gang sign, which the trial court found any minimal probative value was outweighed by the prejudicial effect. 4RP 1161.

Exhibit 163 was a snapchat conversation of unknown provenance. On that basis, the court excluded it: "It is hearsay,

and I'm not sure that this can tie back to [SPT], so I don't believe that the foundation is established to make this relevant to this case." 4RP 1164.

Exhibit 164, was a picture of what appeared to be a gun wrapped in a kerchief. The picture was posted by a third party. The court found that "[b]ecause this is not specifically tied to [SPT] other than the – apparently the sharing of the posting at some point in the past, the probative value concerning this is fairly low, and the prejudicial effect is fairly high" and therefore excluded it under ER 403. 4RP 1167.

Exhibit 165, was an urban dictionary definition of "green light." Because that was provided to explain excluded Exhibit 163, the court also excluded it based on relevance. 4RP 1168.

Luna faults the Court of Appeals for giving these rulings short shrift. Petition at 21. However, with the exception of the gang sign picture (Exh. 162) and the conversation in Exhibit 163, Luna did not specifically argue how the trial court erred in

excluding these exhibits. She failed to present argument on the matter in her brief. Failure to properly brief an issue with argument and citation to authority waives the issue. RAP 10.3(a)(6); *Smith v. King,* 106 Wn.2d 443, 451–52, 722 P.2d 796 (1986); *State v. Harris*, 164 Wn. App. 377, 389 n.7, 263 P.3d 1276 (2011).

Her limited argument regarding the remaining two exhibits was also unpersuasive. Gang evidence falls within the scope of ER 404(b). *State v. Ra*, 144 Wn. App. 688, 701, 175 P.3d 609, *review denied*, 164 Wn.2d 1016 (2008). Gang evidence bears "inherent prejudice." *State v. Mancilla*, 197 Wn. App. 631, 644, 391 P.3d 507 (2017). As such, to be admissible, evidence of gang affiliation must be tied to the specifics of the case. *Mancilla*, 197 Wn. App. at 637. In order to introduce evidence of gang affiliation, there must be a nexus between the crime and the gang membership. *See State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995).

Here there was no evidence whatsoever that SPT was affiliated with a gang. Nor was there any evidence that the animus between her and Luna was in anyway gang-related. Moreover, the exhibit had no indication of when it was posted, because Luna cropped it off when she created the screenshot. 4RP 1070. The court would have been well within its rights to have found the evidence was irrelevant. It certainly did not abuse its discretion in excluding the photo under ER 403.

Luna's reliance on *State v. Duarte Vela*, 200 Wn. App. 306, 402 P.3d 281 (2017), is misplaced. There, the defense sought to introduce direct evidence of threats by the victim against the defendant and his family. The Court found error because it was "well established that a victim's specific acts of violence, *if known by the defendant,* are admissible when the defendant asserts self-defense." *Duarte Vela*, 200 Wn. App. at 326 (emphasis the Court's). Here the "gang" photo was not a specific act of violence know by Luna. It was a photo of four smiling people allegedly flashing a gang sign. There was no

other evidence admitted or offered that SPT was involved with any gang activity.

As for the "greenlight" post, it was not endorsed or posted by SPT, and Luna could not even identify the person who gave it to her. 4RP 1066-67, 1069. The trial court properly also excluded this as lacking a proper foundation.

Finally, even if the court erred in excluding the exhibits, Luna had to show prejudice to establish that her right to a defense was impaired. If the court excluded relevant defense evidence, this Court determines as a matter of law whether the exclusion violated the constitutional right to present a defense. *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017). The more the exclusion of defense evidence prejudiced the defendant, the more likely we will find a constitutional violation. *State v. Jones*, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010).

Applying these factors, the Court in *State v. Burnam*, 4

Wn. App. 2d 368, 379-80, 421 P.3d 977 (2018), distinguished *Duarte Vela*:

> Duarte Vela's case is distinguishable. In that case, Duarte Vela sought to introduce evidence of violent acts known to him through his family members or observations: Menchaca beat one of Duarte Vela's sisters, kidnapped another sister, and made threats to kill the family. These purported acts are obviously violent, *and* Duarte Vela's offer of proof specified what he knew and how he knew it. ….
>
> As further distinguished from *Duarte Vela*, the trial court here allowed the accused to testify in detail about the struggle and his belief that he was fighting for his life, and to fully argue his self-defense theory to the jury.

Here, Luna was unable to explain how she came to possess the "greenlight" post, or when it was posted. She also failed to present any evidence showing that SPT was in any way affiliated with a gang.

More importantly, the trial court admitted *seven* exhibits purporting to establish the basis for her fear of SPT. Luna was able to present testimony from her brother Ty about her alleged reaction to seeing SPT. 4RP 1195-98. Luna herself testified at

great length about her alleged fear of SPT. 4RP 1212-29, 1299-1358, 1397-1401. Her ability to present her defense was in no way impaired. The jury just did not find it compelling, as discussed in the harmless error section, *infra.*

2. The trial court properly excluded evidence of SPT's intoxication where there was no evidence Luna was aware she was drunk.

Luna argues that she should have been permitted to admit evidence that SPT was intoxicated at the time of the offense. She relies on *State v. Jennings*, 199 Wn.2d 53, 63, 502 P.3d 1255, 1260 (2022), but that case is not on point. There the defendant testified that the victim appeared to be high on methamphetamine at the time of the incident. Here, however, Luna never presented any offer of proof that she thought SPT was drunk. In the cited passage, counsel never sought to make a record that *Luna* believed SPT was drunk or that it impacted her fear of her. Luna's only proffered testimony was that her actions "didn't seem normal" for someone she had "communicated with or seen in person." 4RP 1338. Nor was

there any evidence that tied the alleged evidence that "Lola knew that S.P.-T. had a reputation for drinking, fighting, and more." Brief of Appellant at 63. The only evidence of drinking offered in the 40 pages she cited to the Court of Appeals, 4RP 1153-93, pertained to the excluded picture of SPT holding a beer, 4RP 1154-55, which clearly says nothing about whether Luna knew she was drunk at the time of the fight.

Because Luna failed to meet the foundational requirement that she knew or believed SPT was intoxicated at the time of the fight, intoxication evidence was properly excluded. Likewise it cannot be said that it in anyway impacted her ability to present a defense. *Jennings*, 199 Wn.2d at 66. This claim should be rejected.

C. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE ERRONEOUS ADMISSION OF ANY ER 404(B) EVIDENCE WAS HARMLESS.

Luna next argues that the harmless error analysis of the

Court of Appeals was contrary to precedent. This claim is not supported by a fair reading of the opinion.

Non-constitutional errors are harmless, such that reversal is not required, unless "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). "'The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.'" *State v. Hill*, 6 Wn. App. 2d 629, 647, 431 P.3d 1044 (2018) (*quoting State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

The Court of Appeals properly applied this precedent:

> However, the error is harmless because it is not reasonably probable that the admission of these two pieces of evidence materially affected the outcome of the trial. *See State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014).

Opinion at 16. After discussing why the admission of the two items was error, the again Court reiterated and then correctly

applied this standard:

> However, the error was harmless. A trial court's error in admitting evidence is reviewed under the standard for nonconstitutional error. *Gunderson*, 181 Wn.2d at 926. A nonconstitutional error is harmless where there is not a reasonable probability that the error materially affected the verdict. *Id*. Here, in light of significant evidence introduced by the State showing that Luna did not use reasonable force during her fight with SPT, it is not reasonably likely that the admission of this evidence materially affected the jury's verdict.
>
> While Luna was not aware that it was SPT, not HD, who intended to fight her, she still willingly provided HD with her address knowing that it might lead to a fight, as HD expressed the intention to fight. Luna could have declined to give HD her address. She could have stayed inside and not come to the door when SPT arrived. She could have called the police if she feared for her safety or she could have sought support from her stepfather, brother, or boyfriend, all of whom were in the house at the time. Instead, Luna armed herself with a pocketknife and went outside. She held the knife behind her back while arguing with SPT and at no point did she warn SPT not to come near her. At no point during her interaction with SPT did she call for help from someone inside the house. As such, while the trial court erred in admitting "the Purge video" and the "stabbing energy" comment, these pieces of evidence carried minor significance in light of the overall evidence presented by the State to prove intent and to disprove Luna's claim of self-defense. *See Nghiem v. State*, 73 Wn. App.

> 405, 413, 869 P.2d 1086 (1994). The error was harmless because it is not reasonably probable that the admission of these two pieces of evidence materially affected the outcome of the trial. *See Gunderson*, 181 Wn.2d at 926.

Opinion at 18-19.

Here it is important to note that the jury acquitted Luna of premeditated murder. CP 489. They clearly were able to fairly consider the evidence and found that the evidence did not establish premeditation.

The evidence of intentional murder, moreover, was overwhelming. Luna saw SPT approaching through the window. She knew from her texts that HD wanted to come to fight her. She took a knife with her into the yard and while she argued with SPT, she held it behind her back. As soon as SPT punched her, she immediately responded by stabbing her. She further inflicted a total of 27 stab wounds.

Additionally her evidence that she feared SPT was not credible. She had never met her in person before she killed her.

Despite claims that SPT was bigger and older than her, the video shows two girls who were pretty evenly matched. Her feature testimony from her and her brother Ty was shown to be false by the person who was in the car with her. Her claims of fear were directly contradicted by her statement to the police.

Although this evidence was relevant to premeditation, the evidence in support of intentional murder was overwhelming. There is simply no likelihood that its exclusion would have changed the verdict.[6]

D. THE TRIAL COURT PROPERLY ADMITTED LUNA'S VOLUNTARY POST-MIRANDA STATEMENTS TO POLICE.

Luna next challenges the admissibility of her statement to Detective Garland. Her claims are either unpreserved, without

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[6] Luna makes passing reference to the lack of a limiting instruction. Petition at 29. However, it is well-settled that the trial court is not required to sua sponte give a limiting instruction regarding ER 404(b). *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). There is no indication that Luna ever requested such an instruction.

merit, or both.

1. The trial court properly found that Luna waived her Miranda rights.

Luna first superficially argues that the trial court erred in finding her statements were voluntary. She argues that nine of the court's findings of fact are unsupported by the evidence. She failed in the Court of Appeals, however, to even explain how they were incorrect, alleging only that "totality of the circumstances show[ed] that her waiver was not knowing and voluntary." Brief of Appellant at 65. As discussed above, such allegations without argument and citation to authority should be deemed waived. And in any event, the claim was without merit. The Court of Appeals properly so held. Opinion at 33-34.

"The State bears the burden of showing a knowing, voluntary, and intelligent waiver of *Miranda* rights by a preponderance of the evidence." *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). This Court will not disturb a trial court's conclusion that a defendant voluntarily waived their

Miranda rights "if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding." *Id.* Substantial evidence is that which is "'sufficient to persuade a fair-minded, rational, person of the truth of the finding.'" *State v. Scherf*, 192 Wn.2d 350, 370, 429 P.3d 776 (2018) (quoting *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006)). In considering whether a defendant voluntarily waived his *Miranda* rights, courts consider the totality of the circumstances. *State v. Mayer*, 184 Wn.2d 548, 556, 362 P.3d 745 (2015).

A defendant can voluntarily waive his *Miranda* rights even while in physical discomfort or pain. *See State v. Butler*, 165 Wn. App. 820, 828, 269 P.3d 315 (2012); *see also State v. Riley*, 19 Wn. App. 289, 296, 576 P.2d 1311 (voluntary waiver where defendant had not slept for 48 hours and was only partially clothed), *review denied*, 90 Wn.2d 1013 (1978). In *Butler*, the court considered whether the defendant's statements to police were voluntary when the defendant was in the

intensive care unit, required to lay flat in a bed, and on pain medication. 165 Wn. App. at 825. The court held that a defendant can "'voluntarily waive his *Miranda* rights even when he is in the hospital, on medication, and in pain.'" *Id.* at 828 (quoting *U. S. v. George*, 987 F.2d 1428, 1430 (9th Cir. 1993)). The *Butler* court noted that the defendant answered police questions appropriately, and there was no showing that police took advantage of the defendant's weakened condition. *Id.* For these reasons, the court held that the defendant's statements were voluntary. *Id.*

Luna argues that the trial court should have considered her age as a factor impacting the voluntariness of her waiver. But she provides no legal authority mandating that courts issue specific findings regarding the effect of a defendant's age on the voluntariness of their waiver.[7] Where no authorities are cited in support of a proposition, the Court may assume that

[7] The State will address Luna's statutory claim, *infra*.

counsel, after diligent search, has found none. *State v. Arredondo*, 188 Wn.2d 244, 262, 394 P.3d 348 (2017). In any event, substantial evidence supports a finding that Luna's age did not affect the voluntariness of her waiver, as appeared to understand and answer questions coherently, and did not express any confusion regarding her *Miranda* rights.

Here, like in *Butler*, a rational, fair-minded person would be persuaded that a preponderance of the evidence showed that, based on the totality of the circumstances, Luna voluntarily waived her *Miranda* rights because she answered questions appropriately and police did not appear to take advantage of her condition. 165 Wn. App. at 828. Therefore, the trial court did not err in finding that Luna voluntarily waived his right to remain silent and admitting her confession.

Finally, the trial court's challenged[8] findings of fact were supported by substantial evidence. The State will address each

[8] Unchallenged findings of fact are verities on appeal. *Seattle v.*

challenged finding in turn.

VIII

> That Officer Hoyson was told that the defendant stabbed the other party.

CP 428. Hoyson testified that Luna told her that she had stabbed the victim. 1RP 8.

XV

> That the defendant appeared to understand the Miranda warnings read to her.

CP 428. Both Hoyson and Garland testified to this.

Hoyson testified that at the scene, they had a medic evaluate the cuts on Luna's hands. 1RP 9. Once that was done, Hoyson placed her in handcuffs and read Luna the *Miranda* warnings, including a juvenile warning, from her department-issued card. 1RP 9. The card reads:

> You have the right to remain silent. Anything you say can be used against you in a court of law.
>
> You have the right at this time to talk to a lawyer and have them present with you while you're being questioned. If you cannot afford to

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Wiggins, 23 Wn. App. 2d 401, 407, 515 P.3d 1029 (2022).

> hire a lawyer, one will be appointed to represent you before questioning if you wish.
>
> You can decide at any time to exercise these rights and not answer any questions or make any statements.
>
> Additionally, if you are under the age of 18, anything you say can be used against you in a juvenile court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if you were to be tried as an adult.

1RP 9-10. Hoyson asked if she understood and Luna stated that she did. 1RP 10. Luna did not appear to be under the influence of alcohol or drugs. 1RP 10. Nor did she appear to be suffering from any mental health or other impediments to understanding the warnings. 1RP 10. She was calm. 1RP 10. She replied without hesitation to everything Hoyson asked. 1RP 11. She did not ask any clarifying questions. 1RP 11. Hoyson did not ask her any further questions and placed her in her patrol car. 1RP 11.

Later, at the station, Garland conducted the actual interview of Luna. He was informed she had already been

Mirandized. 3RP 619. Before speaking to her he again provided *Miranda* warnings. 3RP 619-20. He also read the additional juvenile warnings from his department card:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights, not answer any questions, or make any statements.
>
> In addition, if you're under the age of 18, anything you say can be used against you in a juvenile court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if you're tried as an adult.

3RP 620-21. He initially had her handcuffs moved to the front and then dispensed with them altogether. 3RP 621. She appeared to understand the warnings. 3RP 621. She did not ask any questions about the warnings or her rights. 3RP 622. She did not initially ask for an attorney, although she did eventually ask for one. 3RP 622. She was not coerced, threatened, or promised anything. 3RP 623.

XVI

> That the defendant did not appear to be under the influence of any substances or suffering from any mental health issues at the time, and was capable of understanding.

CP 428-29. As noted above, Hoyson testified to this. In addition to the testimony summarized above, Garland also testified that she did not voice any confusion, did not seem to be confused and did not stop him or ask for any kind of clarification. 3RP 621. At no point did she lose consciousness or seem to be disoriented or anything else that would cause him to believe she did not understand what he was saying. 3RP 621-22. She did not appear to be under the influence of any substances. 3RP 622. She did not appear to be dealing with any kind of mental health issues that would affect her ability to understand. 3RP 622.

XVII

> That the defendant was calm in demeanor and had no questions after being read the Miranda warnings.

CP 429. This again was testified to by both Hoyson and Garland. Luna herself also conceded that she told Garland she

understood the warnings and never asked him to clarify them. 3RP 637-38.

XXIV

> That aid was summoned to check the defendant after she complained of being light-headed, and aid determined her vital signs all looked good and she was not in need of additional medical attention at that time.

CP 429. Luna herself testified to these facts at the hearing. 3RP 638-39.

XXVII

> That the defendant voiced no concern upon hearing her rights. She did not appear disoriented or under the influence of anything mind-altering.

CP 430. Again, as noted above the Hoyson and Garland both testified to these facts.

XXVIII

> That the defendant agreed to speak with the detective and understood her rights. No threats or promises were made to her.

CP 430. Again, as noted above the Hoyson and Garland both testified to these facts.

XXIX.

> That the defendant knew she didn't have to answer questions. She stated she didn't know how to ask for an attorney, but she understood the warnings provided.

CP 430. This was based on Luna's testimony. 3RP 637.

XXX.

> That the defendant was allowed to speak to her mother. After that conversation, the defendant did ask for an attorney and the interrogation stopped.

CP 430. Garland directly testified to these facts. 3RP 628, 643.

As noted, Luna fails to explain how these findings were not supported by substantial evidence. Plainly they were.

Given these facts and the substantial other facts in the trial court's findings, CP which are verities on appeal, CP 427-30, the totality of the circumstances show that Luna voluntarily waived her rights before giving her confession to Garland. This claim should be rejected.

2. A statute enacted after Luna gave her statement cannot logically be construed to bar the admission of that statement.

In the Court of Appeals Luna claimed for the first time on appeal that her confession should have been suppressed under the authority of a statute that had not been enacted at the time she gave her confession. This claim was not preserved for review, and nothing in the statute suggests it applies retroactively to statements given before its enactment.

a. This claim was not preserved for review.

As discussed previously, RAP 2.5 limits consideration of claims not raised in the trial court to manifest error affecting a constitutional right. A right conferred by statute does not meet this standard. *State v. Hughes*, 154 Wn.2d 118, 153, 110 P.3d 192, 210 (2005) (*citing In re Echeverria,* 141 Wn.2d 323, 336, 6 P.3d 573 (2000) (allocution right is only statutory)), *abrogated on other grounds*, *Washington v. Recuenco*, 548 U.S. 212 (2006). RCW 13.40.740 provides a purely statutory right for juveniles to consult with an attorney before waiving their

Miranda rights. As such, because Luna never raised this claim below,[9] it should not be considered now. Although the Court of Appeals addressed the claim, it would properly have rejected for failing to present it to the trial court.

b. Application of the statute to a statement taken before it was enacted is contrary to the Legislature's intent.

Even if this claim were properly before the Court it would be meritless, as the Court of Appeals properly concluded. Opinion at 34-35. Luna relies on RCW 13.40.740, which was a new section added by Laws of 2021, ch. 328 § 1. The act took effect January 1, 2022. *Id.*, § 7. Luna acknowledges that the act was not in effect at the time she gave her statement, but nevertheless claims that it should have barred the admission of her statement at her trial, which was held after the effective date. This would be contrary to legislative intent, and an absurd result.

[9] The act was in effect at the time of trial.

The operative clause is found in RCW 13.40.740(1):

> Except as provided in subsection (4) of this section, law enforcement shall provide a juvenile with access to an attorney for consultation, which may be provided in person, by telephone, or by video conference, before the juvenile waives any constitutional rights if a law enforcement officer:
>
> (a) Questions a juvenile during a custodial interrogation;
>
> (b) Detains a juvenile based on probable cause of involvement in criminal activity; …

The remaining provisions are essentially remedial: RCW 13.40.740(2) (prohibiting waiver of (1)); RCW 13.40.740(3) (failure to comply with (1) results in exclusion of the statement); RCW 13.40.740(4) (providing exceptions where the juvenile is a trafficking victim or where a life is in danger); RCW 13.40.740(5) (providing for procedure after consultation has been provided); RCW 13.40.740(6) (definitions).

Since RCW 13.40.740(1) was not in effect at the time Luna made her statement to the police, and indeed, the section

had not even been enacted at that time,[10] it would not be reasonable to expect the police to have complied with it. There is nothing in the law that indicates a Legislative intent to exclude statements not complying with RCW 13.40.740(1) that were made before it was enacted.

To the contrary, RCW 13.40.740(2) through (4) all speak to remedies where RCW 13.40.740(1) was not honored. Luna would have this Court supply a remedy for the violation of a statute that did not yet exist. This is an absurd result.

Moreover, Luna's contention runs afoul of the savings statute, RCW 10.01.040. That section requires that the crimes the defendant committed be punished pursuant to the statutes in force when they were committed. That statute provides in pertinent part:

> Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or

[10] The legislation was approved by the Governor on May 18, 2021, nearly five months after Luna gave her statement on January 30, 2021.

> penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

There is no express provision in Laws of 2021, ch. 328, declaring intent for the amendment to apply retroactively to statements taken before its effective date.

The savings statute applies to substantive changes in the law. *State v. Pillatos,* 159 Wn.2d 459, 472, 150 P.3d 1130 (2007). "Substantive amendments change either the elements of the offense, the severity of the punishment, or *what evidence can be used to prove the offense*." *State v. Calhoun*, 163 Wn. App. 153, 164, 257 P.3d 693 (2011) (emphasis supplied) (*citing State v. Hodgson*, 108 Wn.2d 662, 669, 740 P.2d 848 (1987)).

Prior to the enactment of Laws of 2021, ch. 328, a juvenile's statement was admissible if there was an express

waiver after advisement of rights:

> Waiver of any right which a juvenile has under this chapter must be an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived.

RCW 13.40.140(10) (2020). Evidence was excludable only under circumstances in which a statement by an adult would be excludable. RCW 13.40.140(8) (2020).[11] Laws of 2021, ch. 328, § 1, thus changes what evidence may be admitted against a juvenile by excluding evidence that was lawfully taken at the time of the juvenile's statement to police. It is thus a substantive change subject to the savings statute. Under that statute, the law in effect at the time of the crime should apply. *See also State v. Jenks*, 197 Wn.2d 708, 713-22, 487 P.3d 482 (2021). Luna fails to show any error on the part of the Court of Appeals. Review should be denied.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests

[11] Both sections were amended by Laws of 2021, ch. 328, § 2,

that the Court deny Luna's petition for review.

VII. CERTIFICATION

This document contains 9901 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED November 5, 2024.

Respectfully submitted,

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to require compliance with the new RCW 13.40.740.