No. 58497-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

GEORGE ROBERT LAINE,

Appellant.

PETITION FOR REVIEW

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A. INTRODUCTION

This case presents an issue of first impression regarding the meaning of recklessness in the vehicular homicide statute. RCW 46.61.520. Division II held for the first time that inattentive driving and the failure to maintain one's lane alone can support a conviction for reckless vehicular homicide. That holding presents an issue of substantial public importance for this Court to determine and conflicts with existing precedent. RAP 13.4(b)(1), (2), and (4). This Court should grant review and reverse.

B. IDENTITY OF PETITIONER

George Laine is the petitioning party.

C. COURT OF APPEALS DECISION

Division II filed its opinion on November 21, 2024, and denied George's motion for publication on January 28, 2025. *See* Appendix for copies.

D. ISSUES PRESENTED FOR REVIEW

1. Should the judgment and sentence be

reversed because evidence that a driver was inattentive or failed to maintain his or her lane of travel are insufficient on their own to sustain a conviction for reckless vehicular homicide?

2. Did the prosecutor's references to the decedent's tender age and comments about damage to the vehicle when no expert testified and or accident reconstruction was performed amount to prejudicial prosecutorial misconduct warranting a new trial?

E. STATEMENT OF THE CASE

(1) Prelude to the Accident

George Laine was driving his truck on Sandridge Road in Pacific County on the evening of December 20, 2019. George was 65 years old at the time. CP 1; RP 386. George kept care of his truck, making sure it was well maintained and installing new tires within the past month. RP 396. He was returning home from a doctor's appointment. RP 387.

George saw his doctor for stress. RP 387. He and his wife had temporarily separated, and he had anxiety and chest pains. RP 387. His doctor prescribed anxiety mediation and told George he was fine. RP 387. His doctor did not warn him that

he was unsafe to drive. RP 387. George filled the prescription but did not yet take any medication or any other impairing substance, as he drove home on Sandridge Road. RP 388.

Sandridge is a "country road" with "not a lot of overhead light." RP 206. It is "very narrow" with "not a lot of shoulder space." RP 227, 243. Connecting roadways can be "hard to see." CP 227-28. Roads were wet at the time of the accident, and it was overcast. RP 181. The accident occurred around 4:30 p.m. in late December, CP 1, so it was dusk if not dark. RP 181.

The speed limit varies, but it was 45 miles per hour in the location of the accident. RP 244. Passing was allowed at that section of the road. RP 196. There was no barrier between the two lanes; the center line is dotted, not solid. RP 206.

After driving for 10 to 15 minutes, George's truck departed from its lane and clipped an oncoming Jeep driven by Steven Lehotta, with Marina Koontz in the passenger seat and their two children in the back. CP 1. The Jeep traveled into a tree embankment and rolled on its side. RP 200. The passengers

suffered injuries, and, tragically, the couple's 11-year-old son, G.L., passed away. RP 297.

(2) First Response and Investigation

First responders reported that G.L. was seemingly tossed from his seat lying on the ground in the "back cargo section of the jeep" not wearing a seatbelt. RP 302. Ms. Koontz was the only occupant who remembered any portion of the accident. Ms. Koontz testified that even though the roadway was mostly straight, they did not notice George's truck until right before they collided with it. RP 365-66. She lost consciousness after the accident. RP 367. She said that George may have been trying to pass a car, but she could not be sure if there were other cars nearby. RP 372.

George cooperated with officers at the scene. RP 199, 260, 263. George had leg injuries and was in shock. RP 391. Officers described him as "disoriented and confused." RP 175. George was not immediately certain what caused the accident, but he offered that he had been a little "out of it" due to the mental

health stressors he was experiencing. RP 220. He testified at trial that he also recalled seeing movement in his peripheral vision, possibly from one of the connecting roadways officers described as "hard to see," CP 227-28, and he possibly tried to maneuver around whatever he perceived coming at him on the dark wet road. RP 398-99.

Officers testified that George was "very concerned" about the other occupants of the vehicle. RP 200. He asked whether they were injured at the scene and later at the hospital, concerned about their well-being. RP 191, 393.

Officers began their investigation and confirmed that George was sober. CP 215, 261. His on-scene breathalyzer was 0.0, and field sobriety tests revealed no signs of impairment. RP 246-47, 256-61. George provided a voluntary blood draw, but the State lost that evidence, which would have further confirmed his sobriety. RP 268-69. His medical records from the hospital shortly after the accident showed no impairing substances in his blood. RP 269-70.

George was not on his phone. Phone records showed that at "the time of the collision [George] was not sending or receiving any messages and he was not making or receiving any phone calls." RP 183.

George had no prior criminal history. He had no prior instances of DUI, reckless or negligent driving, or any other instances tending to show a history of negligent, or even poor driving. CP 5.

George was not speeding at the time of the accident; the State offered no such evidence at trial. Officers saw and measured a potential skid mark, which likely showed he applied his brakes, but they failed to preserve this evidence by taking accurate pictures of it. RP 195-96. It was gone in the following days when the weather dried up. RP 195-96.

Aside from taking a few unhelpful measurements at the scene, officers did not perform an accident reconstruction, and no accident reconstruction evidence was offered at trial. RP 210. Officers admitted that this violated "normal protocol";

reconstructions are expected in fatality collisions. RP 210. The State did not even preserve the vehicles involved in the collision. RP 205.

Without preserved evidence, officers admitted they could not rule out any mechanical or other accidental cause of the collision. RP 211, 217. Without a reconstruction, officers admitted they could not determine the point of impact on the two cars, how fast either vehicle was traveling, whether either car hit their brakes, or who was even at fault. RP 209-10, 217.

However, two witnesses came forward to testify that they saw the collision and they observed George's truck depart from its lane shortly before the accident. Mr. Caton testified that he saw George's truck "swerve in and out of" its lane as he followed it up Sandridge Road. RP 116. Amber Williams was driving the car with Mr. Caton, and she testified that she saw George's truck cross over the line to the left and right of his lane "probably six times" over the course of 10 to 15 minutes before the accident. RP 138.

Mr. Caton took a short video on his phone several minutes before the accident. Ex. 1. The video is dark, poor quality, and lasts for just a few seconds, but it appears to show George's truck cross the center lane as it takes a wide path on one of the portions of the road. *Id.* George's brake lights are on. *Id.* Mr. Caton testified that George's truck left the roadway "once" and estimated that he drifted from his lane at least 10 times. RP 120. But he did not think to call police because he "just didn't see [George's driving] as that big of a problem at the time." RP 117.

Neither witness reported that George was speeding; the State offered no such testimony from anyone. Ms. Williams could not recall if there were any other vehicles on the road while following George's truck, and the video shows no other cars on the empty road. RP 144; Ex. 1.

(3) Trial and Appeal

Three years passed before the State charged George in Pacific County Superior Court under RCW 46.61.520(1)(b) and (c) with vehicular homicide for causing a death while driving

either with disregard for the safety of others or in a reckless manner. CP 1-2. If proven, recklessness comes with a much longer sentence. RCW 9.94A.515.

A jury heard the evidence above, the only evidence of reckless driving being that George allegedly swerved from his lane several times in a 10-to-15-minute drive up Sandridge Road, during dark and wet conditions. The prosecutor admitted there was no evidence that George intentionally tried to harm another car on the road: "Now, I'm not going to sit there and say that he intended to aim straight for a car and he intended to specifically try to kill G.L. Absolutely not." RP 434. Officers even testified that "some weaving" from a driver's lane is "normal," and it can be caused by any number of factors, including temporary distraction, visibility of the lanes, and weather conditions. RP 218.

George made a mid-trial motion to dismiss the charge of vehicular homicide conducted by driving in a reckless manner because the State failed to present sufficient evidence to allow

that charge to go to a jury. RP 375-82. The court denied the motion. *Id.*

In closing, the only evidence the State could cite was the testimony that he was departing from his lane due to inattention or perceived movement in his periphery on the dark wet road a handful of times in the 10 to 15 minutes before the accident. Left without an accident reconstruction or any evidence of intoxication, speeding, eluding, racing, horseplay, or the like that one would expect to accompany a charge of recklessness, the prosecutor resorted to improper argument to "prove" George's recklessness during closing.

First, even though no expert testified, the prosecutor relied on the damage to the vehicles to show that George was reckless:

> You get the photographs of the collision. That's not just mere negligence with how much damage, right? So look at Mr. Laine's truck. If this would have been a scenario where a simple s[w]erve out of the way, swerve back into your lane, you wouldn't have such a head-on collision…So that shows how reckless he is just from the sheer damage of the vehicles.

RP 439-41. As discussed below, this argument was speculative because it was unsupported by expert testimony and prejudicial because it proved nothing about George's conduct before the collision.

Second, the prosecutor appealed to the decedent's age as "proof" that George was reckless:

> And I keep hammering home the reckless driving because we know we have the evidence of who passed away. An 11-year-old boy sitting in the passenger seat of his dad -- on his dad's side.

RP 440. As discussed below, appealing to a decedent's tender age is improper argument when age is irrelevant to the elements of the charged offense.

George's attorney did not object in the moment to these arguments, but the record shows she raised concerns several times about the delicate position in which the State's improper arguments put the defense in. At one point, a juror cried during testimony about the child decedent, and counsel discussed the issue with the court, including her reticence to single jurors out

or call undue attention to the issue for fear of prejudice to George. RP 164-67. Later George's counsel explained she had been "deliberately [holding] back objections" with respect to testimony about the accident, including the injuries and damage it caused, to avoid calling undue attention to such "extremely prejudicial" evidence. RP 351-56.

The jury returned a guilty verdict and found that George drove both in a reckless manner and with disregard for the safety of others. CP 94-95. Again, George was a first-time offender, with no history of criminal behavior or poor driving, and he had significant community support at sentencing. CP 112-66. Nevertheless, the trial court entered the maximum sentence within the standard range for recklessness of 102 months. CP 200-12.

Division II affirmed. Division II stated that "[t]here are no Washington cases that are directly comparable to the facts in this case." Slip op. at 10. The court admitted that "there was no indication that Laine engaged in conduct 'typical' of driving in a

reckless manner." Slip op. at 8-9.

> There was no evidence that he was impaired by alcohol or drugs. He was not speeding. He did not disregard traffic signals. He was not racing or chasing another vehicle. He was not engaged in horseplay. He was not texting or on his phone.

Id. Still, Division II held for the first time in Washington that "a rational jury could find that the inability to stay in the correct lane for an extended period of time, including driving completely in the oncoming lane for almost four seconds, constituted driving in a 'rash or heedless manner, indifferent to the consequences.'" *Id*. (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 631, 106 P.3d 196 (2005)).

Division II denied Geroge's motion to publish this newly established standard for driving in a reckless manner. This timely petition follows.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) Review Is Warranted Under RAP 13.4(b) Because Division II's Holding Is New Law with Important, Statewide Ramifications

Division II concedes in its opinion that there are no cases "directly comparable" to this one and it held for the first time in Washington that the inability to maintain one's lane, without anything more, is punishable as reckless vehicular homicide. Slip op. at 10. This Court often grants review to address issues of first impression, particularly issues regarding statutory interpretation.[1] It is important to get clear guidance from this Court on these issues to ensure consistent application of the law across Washington, particularly in criminal cases. For example, this Court recently granted review in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), to address an issue of first impression – the *mens rea* involved in a prosecution under the drug

[1] *E.g.*, *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982) (1981 tort reform legislation); *State v. Keller*, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983) (conditional release statute for defendant acquitted due to insanity); *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (PRA's statute of limitations); *Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 379 P.3d 120 (2016) (statute addressing repayment of industrial insurance benefits); *M.N. v. MultiCare Health Sys., Inc.*, 2 Wn.3d 655, 541 P.3d 346 (2024) (scope of medical negligence statute).

possession statute.

This case is similar to *Blake* in that it concerns the meaning of driving in a reckless manner sufficient to support a conviction under RCW 46.61.520(1)(b). Division II admitted that it broke new ground in holding for the first time that inattentive driving and the failure to maintain one's lane alone can constitute recklessness. This Court should grant review and correct that holding because it threatens to severely punish a host of conduct that does not rise to the conduct indicative of recklessness as previously established in Washington. This is an issue of substantial public importance that affects drivers across Washington. RAP 13.4(b)(4).

Vehicular homicide can be committed three ways under RCW 46.61.520. The driver either proximately causes a death: (a) "While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or (b) In a reckless manner; or (c) With disregard for the safety of others." *Id.*

The first is not at issue here; George was completely sober

as confirmed by many tests. Thus, this case turns on the degrees of culpability within the vehicular homicide statute – driving in a reckless manner versus driving with disregard for the safety of others.

George conceded on appeal that a jury could find that he drove with some disregard for the safety of others. But this is no small concession. Disregard for the safety of others sufficient to impose criminal culpability is a higher bar than ordinary negligence. "Disregard for the safety of others is an aggravated kind of negligence falling short of recklessness but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term negligence." *State v. Lopez*, 93 Wn. App. 619, 623, 970 P.2d 765 (1999) (quotation omitted). "Disregard for the safety of others is conduct *more culpable* than driving in such a manner as to endanger or be likely to endanger any persons or property." *Id.* (quotation omitted) (emphasis added).

Given this standard already imposes a bar beyond ordinary

negligence (similar to gross negligence), driving in a reckless manner requires *significantly greater proof* than ordinary negligence to sustain a conviction. Driving in a reckless manner, for purposes of the vehicular homicide statute, means driving in a "rash or heedless manner, indifferent to the consequences." *Roggenkamp*, 153 Wn.2d at 628.[2]

Construing the criminal statutes as a whole further shows the high bar the State must meet to sustain a conviction for driving in a reckless manner. *See Segura v. Cabrera*, 184 Wn.2d 587, 591, 362 P.3d 1278, 1280 (2015) (when interpreting Legislative intent, a court looks at "related provisions, and the statutory scheme as a whole"). RCW 9.94A.515 defines the seriousness level of crimes for sentencing purposes. The Legislature assigned a seriousness level to vehicular homicide by the operation of a vehicle in a reckless manner of level XI, while

[2] A jury must be able to distinguish reckless driving as more culpable than driving with disregard for the safety of others, or a defendant's equal protection rights are implicated. *See State v. May*, 68 Wn. App. 491, 496, 843 P.2d 1102 (1993).

assigning a level VII score to vehicular homicide, by disregard for the safety of others. *Id.* For a defendant like George, with no prior criminal history, the result is huge. The midpoint sentence for a level XI offense is 90 months, while the midpoint sentence for a level VII offense is 17.5 months. RCW 9.94A.510. Thus, the Legislature determined that homicide committed while driving in a reckless manner warrants more than *five times* the punishment as driving with disregard for the safety of others.

This shows that the evidence necessary to support a conviction of driving in a reckless manner is *substantially more* than that required to show the already high bar imposed by "aggravated kind of negligence" encompassed by driving with "disregard for the safety of others." *Lopez*, 93 Wn. App. at 623. It requires something far more than even driving in a manner one knows is "likely to endanger any persons or property." *Id.* Typically, it involves "speeding, horseplay, or driving under the influence of intoxicants," none of which occurred here. *Id.* (underage and unlicensed driver could not be convicted of

vehicular homicide for departing from her lane around a turn, killing a passenger).

Even viewing the evidence most favorably to the State on appeal, substantial evidence does not support the jury's finding that George drove "in a reckless manner" when he drifted from his lane 5 to 10 times over the course of 10 to 15 minutes, due to inattention or because he thought he saw movement in his peripheral vision. Such behavior does not exhibit driving rashly or heedlessly while "indifferent to the consequences." *Roggenkamp,* 153 Wn.2d at 628. Division II's opinion lowers the bar to conviction far too low.

Ordinarily, the exercise of "slight care" is enough to defeat an allegation that a defendant acted with gross negligence, let alone recklessness. *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 461, 309 P.3d 528 (2013) (civil case). George showed *at least* slight care in many ways. He took care to ensure he was sober. He took care to address his mental health, visiting a doctor the day of the accident who did not warn him that he

was unsafe to drive. He took care to maintain his vehicle, recently installing new tires. He took care to drive the speed limit and he applied his brakes, as the video and skid marks at the scene showed. This is not rash heedlessness.

Nor was he indifferent to the consequences. He fully cooperated with police and showed great concern for the other people involved in the tragic accident. The risk of harm was not certain to occur. The road was empty. And *passing was allowed*. It would have been perfectly legal to perform the same conduct had George been peeking out from behind a car to gauge whether he could safely pass. Officers testified that some weaving is a normal occurrence, not exceptional reckless behavior. RP 218. The trailing witness was concerned, but not enough to call police because George's driving "just didn't" seem like "that big of a problem at the time." RP 117.

Unfortunately, the conditions were conducive to an accident: George was an older driver, traveling down a dimly lit and narrow road, in dark and wet conditions. It was a tragedy,

not criminal recklessness. Division II's outlier opinion opens the door to punishing behavior less culpable than criminal recklessness, including attempting to pass a car on a road where passing is permitted, driving using automated assistance that malfunctions, driving while elderly or while undergoing a medical event, and more.

Division II's analysis of this issue of first impression cannot stand. Review is warranted under RAP 13.4(b)(4), so this Court can resolve this previously untested issue under Washington law.

(2) Division II's Opinion Conflicts with Precedent

Review is also warranted because Division II's opinion conflicts with precedent. RAP 13.4(b)(1), (2). Failing to maintain one's lane at the speed limit on a road where passing is allowed is not rash or heedless behavior, exhibiting indifference to the consequences. That is the standard this Court established in *Roggenkamp*, 153 Wn.2d at 628, and Division II's opinion untenability conflicts with that high burden of proof. RAP

13.4(b)(1).

Again, while there is no perfectly on-point case, courts have held that extreme misconduct supports a charge of reckless vehicular homicide. Typically, this means speeding, horseplay or driving under the influence of intoxicants, not merely driving inattentively down a relatively empty country road. *State v. Hanna*, 123 Wn.2d 704, 707, 871 P.2d 135 (1994) (cars "racing" on public road at 80-100 miles per hour, lost control and crossed median line); *State v. Hill*, 48 Wn. App. 344, 345, 739 P.2d 707 (1987) (intoxicated driver traveled "north in the southbound lanes" of a freeway without trying to dodge oncoming traffic); *State v. Randhawa*, 133 Wn.2d 67, 74, 941 P.2d 661 (1997) (intoxicated, speeding, driver failed to negotiate a "sweeping curve"); *State v. Kenyon*, 123 Wn.2d 720, 724, 871 P.2d 144 (1994) (speeding twice the speed limit while "sashaying" across the road on bad tires).

The most on-point case is *Lopez*, 93 Wn. App. 619. There a 14-year-old, unlicensed, and untrained driver lost control while

driving 50 miles per hour, departed from her lane, and crashed her vehicle, killing her passenger. Every second that defendant spent behind the wheel driving at those speeds, without any training, posed a serious danger. And her decision to operate the vehicle without training was "more than a minor inadvertence or oversight." *Id.* at 622-24. Still, Division III held that her behavior "without more" did not rise to the culpability required to prove vehicular homicide. *Id*. Ordinarily, that requires the State to show "speeding, horseplay or driving under the influence of intoxicants." 93 Wn. App. at 623.

Here, there was no evidence of any of these hallmark indicators of reckless driving. At best one can say that George should have known he posed some danger because he was "out of it," but so did the underage, unlicensed driver in *Lopez* who knew she could not safely operate a car yet went on a joyride anyway. This conflict is untenable. This Court should grant review to correct Division II's departure from this persuasive precedent. RAP 13.4(b)(2).

Moreover, Division II's opinion is an outlier on a national scale.[3] *See People v. Faucett*, 206 A.D.3d 1463, 1466 (N.Y. App. Div. 2022). (driver's failure "to maintain [their] lane…does not rise to the "moral blameworthiness required to sustain a charge of criminally negligent homicide."); *Whitaker v. State*, 778 N.E.2d 423, 425 (Ind. Ct. App. 2002) ("Proof that an accident arose out of the inadvertence, lack of attention, forgetfulness or thoughtfulness of the driver of a vehicle, or from an error of judgment on his part, will not support a charge of reckless homicide." (quotation omitted)); *DeVaney v. State*, 288 N.E.2d 732, 738 (Ind. 1972) ("the mere fact that it was shown that appellant crossed the center line while driving [cannot] be considered driving 'with reckless disregard for the safety of others."); *Plummer v. State*, 702 A.2d 453, 465 (Md. App. 1997), *certiorari denied*, 349 Md. 104 (1998) (inattentiveness without

[3] Decisions from other jurisdictions are especially helpful when dealing with issues of first impression. *See, e.g., Dellen Wood Prod., Inc. v. Washington State Dep't of Lab. & Indus.*, 179 Wn. App. 601, 617 n.20, 319 P.3d 847 (2014).

further evidence of speeding, intoxication, or serious misconduct while driving did not meet the level of criminal culpability required to prove vehicular homicide); *State v. Yarborough*, 930 P.2d 131, 138 (N.M. 1996) (operating "a vehicle in a careless, inattentive or imprudent manner, without due regard for the width, grade, curves, corners, traffic, weather and road conditions and all other attendant circumstances," without more, is not vehicular homicide).

If Washington is going to treat recklessness differently than these other jurisdictions and punish the failure to maintain one's lane as recklessness, then this Court should make that holding, not a single panel of Division II. Review of this important public issue is warranted. RAP 13.4(b)(1), (2), (4).

(3) With No Evidence to Show Recklessness, the State Resorted to Improper, Irrelevant Argument Appealing to the Decedent's Age that Amounted to Prejudicial Prosecutorial Misconduct

Left without anything other than inattention to prove recklessness or to distinguish it from the lesser culpable mental

state of disregarding the safety of others, the State resorted to improper appeal to the age of the decedent:

> And I keep hammering home the reckless driving because we know we have the evidence of who passed away. An 11-year-old boy…

RP 440 (emphasis added). The prosecutor doubled down on improper arguments by using damage of the two vehicles to "prove" recklessness even though no expert witness testified:

> You get the photographs of the collision. That's not just mere negligence with how much damage, right? So look at Mr. Laine's truck. If this would have been a scenario where a simple s[w]erve out of the way, swerve back into your lane, you wouldn't have such a head-on collision…So that shows how reckless he is just from the sheer damage of the vehicles.

RP 439-41; *see also*, RP 438 (repeatedly referring to the crash as "head on", even though no accident reconstruction was performed and the State's witnesses admitted they could not conclude the point of impact for the vehicles, RP 209-10, 217).

Review and reversal are warranted on those issues as well, because allowing that misconduct conflicts with precedent on an

issue of substantial public importance. RAP 13.4(b)(1), (2), (4).

First, the age of the victim, or the fact that there was a victim at all, is not proof of negligence, let alone recklessness. Even "under negligence law, courts will not view a party's acts with the clarity of hindsight." *Brown v. Dep't of Soc. & Health Servs.*, 190 Wn. App. 572, 596, 360 P.3d 875 (2015) (reversing because evidence did not support factual finding that a parent neglected her son, which requires a disregard of risk equivalent to recklessness). Put another way, a fact-finder must evaluate whether behavior creates "'an extreme degree of risk' by looking at the conduct itself, not the resultant harm." *Harber v. State*, 594 S.W.3d 438, 449 (Tex. App. 2019) (reversing vehicular homicide conviction where driver was merely inattentive and failed to maintain his lane).

Second, arguments related to a "victim's tender age" are improper when they are irrelevant to the elements of the charged offense. *State v. Clark*, 143 Wn.2d 731, 782, 24 P.3d 1006 (2001). In *Clark* this Court held that appealing to a victim's age

where age is not an element of the crime is prejudicial misconduct. It may be "the most prejudicial evidence entered…a bit of evidence which the jury could not have possibly disregarded." *Id.* at 783. The same is true here; George's counsel felt precluded from making objections and calling undue attention to sensitive issues as she explained on the record. RP 164-67, 351-56. Division II's opinion conflicts with this authority. RAP 13.4(b)(1).

Finally, accident reconstruction requires expert testimony because it involves technical understanding beyond that of a typical lay juror. *See* ER 701 (*State v. Phillips*, 123 Wn. App. 761, 765, 98 P.3d 838 (2004) (accident reconstruction testimony is subject to ER 702 and the *Frye*[4] admissibility test). A defendant cannot be convicted based on evidence or testimony that would require expert opinion. *See, e.g., City of Seattle v. Levesque*, 12 Wn. App. 2d 687, 711, 460 P.3d 205 (2020)

[4] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

(reversing verdict where State offered opinions on the evidence without sufficiently qualified expert testimony).

The State offered no accident reconstruction and no expert testimony to show that the "the sheer damage of the vehicles" evidenced recklessness but was permitted to argue that in closing. This prejudicially affected the outcome given the lack of evidence on recklessness. Division II's opinion conflicts with precedent. RAP 13.4(b)(1), (2).

This Court should grant review and reverse so George can *at least* have a fair trial, free from speculation, prejudice, and argument unsupported by required expert foundation.

G. CONCLUSION

For these reasons the Court should grant review and reverse.

This document contains 4,994 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 27th day of February, 2025.

Respectfully submitted,

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APPENDIX

Filed
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GEORGE ROBERT LAINE, Appellant.	No. 58497-2-II UNPUBLISHED OPINION

MAXA, J. – George Laine appeals his conviction of vehicular homicide by driving in a reckless manner. Laine was driving on a rural, two-lane road and he drove over the center line, colliding with an oncoming car. One of the passengers in the oncoming car, an 11-year-old boy, died. Two witnesses who were driving behind Laine observed him swerving into the opposite lane and onto the right shoulder numerous times for 10 to 15 minutes before the accident.

Laine argues that (1) the State presented insufficient evidence to convict him of vehicular homicide by driving in a reckless manner, and (2) the prosecutor engaged in misconduct during closing argument when he referred to the deceased boy's age when discussing recklessness and that the damage to the vehicles was evidence of recklessness.

We hold that (1) the State presented sufficient evidence to convict because viewing the evidence in a light most favorable to the State, a rational trier of fact could find that Laine was driving in a reckless manner; and (2) Laine's prosecutorial misconduct claims fail. Accordingly, we affirm Laine's conviction.

FACTS

Background

At the time of the accident, Laine was a 65-year-old resident of Astoria, Oregon. In December 2019, he was driving a pickup truck on Sandridge Road, a narrow two-lane road in rural Pacific County with a white, dashed center line dividing the two lanes. The road was fairly straight, with a few slight curves. Passing was allowed. It was dusk, and the road was wet.

As a Jeep approached from the opposite direction, Laine drove over the center line and collided with the Jeep, which went into a ditch. 11-year-old Gaven Lehotta was sitting in the back of the Jeep next to his sister, and his parents were in the driver and front passenger seat. Gaven died as a result of the injuries he sustained in the accident.

The State charged Laine with vehicular homicide by driving in a reckless manner and/or with disregard for the safely of others.

Trial Testimony

Jacob Caton was a passenger in a car that his mother, Amber Williams, was driving. They were driving behind Laine on Sandridge Road and witnessed the accident. Caton testified that he observed Laine's truck swerving in and out of its lane. He was behind the truck for at least five minutes and saw the truck swerve off the road at least 10 times. Caton stated that Laine was "constantly back over each side of the lines" and "went off the roadway once and almost struck a light pole and a fence." Rep. of Proc. (RP) at 119-20.

Caton recorded a short video of the truck on his cell phone "in case anything happened." RP at 116. The video was admitted into evidence and played for the jury at trial. The video showed a truck driving over the center line. The vehicle was almost completely in the opposite lane for almost four seconds before returning to the right lane. On the video, Williams stated,

"Dude, I have never seen someone drive like – ," and then the video ended. Ex. 1. However, Caton did not contact law enforcement because he did not "see it as that big of a problem at the time." RP at 117.

Caton testified that he eventually witnessed the truck crash into a Jeep that was heading south in the opposite lane. He observed the truck "go completely over the lane into the other lane completely, and the Jeep kind of flew in the air and they both went into the ditch." RP at 118.

Williams testified that the weather was wet because it had been raining the evening of the accident. When she was driving home with Caton, she saw Laine driving erratically. The truck was "going over the line on the right and the left, just some not normal driving," and the truck crossed over the middle divide going to the left. RP at 137. She saw the truck almost hit a mailbox on the right hand side and "fishtailing gravel on the left." RP at 139. Laine's truck had two wheels over the center line.

Williams stated that she was driving behind Laine for 10 to 15 minutes and saw him go back and forth over the line about six times. She repeatedly honked her horn and flashed her flashers, but did not see any response from Laine. Williams "knew something bad was going to happen by the way [Laine] was driving" and wanted to document it, so she asked Caton to record the driving on his cell phone. RP at 139. Williams later saw the truck go over the center line and collide with a Jeep, which went down into a ditch. She stated that Laine's truck "smashed head on into the Jeep." RP at 140.

Randy Wiegardt, the chief criminal deputy for Pacific County Sheriff's Office, was dispatched to the accident. He testified that during his interaction with Laine immediately after the accident, he did not smell any alcohol or marijuana and there was no other indication that Laine

was impaired. Wiegardt administered a breath test and the result was zero, showing that Laine had not consumed any alcohol.

Wiegardt stated that he could not tell how fast either vehicle was going. But there was no evidence presented at trial that Laine was speeding. And Wiegardt obtained Laine's phone records, which showed that Laine had not been sending or receiving any messages or phone calls at the time of the accident.

Wiegardt testified that Laine told him that he was going through a divorce and that he had "been out of it." RP at 177. Laine also said that he believed the accident happened because he had not slept well in several weeks and was suffering from anxiety.

Wiegardt acknowledged on cross-examination that some weaving is normal. He agreed that weather conditions can impact the visibility of lines on the road.

The trial court admitted without objection exhibits showing photographs of damage to the two vehicles and photographs of the deceased boy.

Laine made a mid-trial motion to dismiss the charge of vehicular homicide by driving in a reckless manner based on insufficiency of the evidence. The trial court denied the motion. The court stated, "The fact that that was driving that was not a single incident, that it was multiple incidents that were witnessed that happened over a length of time, I think all goes into the calculation as to whether or not it's a heedless manner or reckless." RP at 381.

Laine then testified that on the day of the accident, he was on his way home from a doctor's appointment. He had gone to the doctor because he and his wife were temporarily separated and he was concerned because he was feeling anxious and had chest pains. The doctor told Laine that he was suffering from anxiety and prescribed him medication. But the doctor had said that everything was fine and he did not prohibit Laine from driving.

Laine picked up his prescription but had not taken any yet. He stated that he did not have any alcohol or any non-prescribed medications or drugs. He was driving down Sandridge Road at dusk, it was rainy, and visibility was not great. The speed limit was 45 miles per hour and Laine usually set his cruise control at 45 miles per hour if there was no other traffic. In addition, Laine's truck had new tires that were less than a month old, and he was unaware of any mechanical issues with his truck.

Laine stated that there was a car driving in front of him and just before the accident he thought he saw something move on the right side of his truck. He did not know if he had veered to the left, but he turned his head to the right to look at whatever he thought he saw and when he turned his head back there was a huge crash.

Closing Argument

During closing argument, the prosecutor stated,

> You get the photographs of the collision. That's not just mere negligence with how much damage, right? So look at Mr. Laine's truck. If this would have been a scenario where a simple serve out of the way, swerve back into your lane, you wouldn't have such a head-on collision. All testimony is uncontroverted that it's Mr. Laine's car that went in to [the Jeep], into [the Jeep's] lane. Zero evidence even remotely suggests otherwise. Even [Laine's] own statements at the time of the event, when his memory was fresh, when he was going to be cooperative. *So that shows how reckless he is just from the sheer damage of the vehicles.*
>
> And *I keep hammering home the reckless driving because we know we have the evidence of who passed away. An 11-year-old boy* sitting in the passenger seat of his dad -- on his dad's side. His dad got the second most largest [sic] injuries on that side, the driver's side of the vehicle. We know it was caused from collision. We've heard all the medical testimony. [The boy] was dead upon -- quite close to after the impact of that vehicle.

RP at 439-40 (emphasis added). Laine did not object to any of these statements.

During his closing argument, Laine's attorney stated that Laine "has to live with the fact that people were saying that he took the life of an 11-year-old boy." RP at 453.

Verdict

The jury found Laine guilty of vehicular homicide and in a special verdict form found that he was both driving in a reckless manner and driving with disregard for the safety of others. Laine appeals his conviction of vehicular homicide by driving in a reckless manner.

ANALYSIS

A. SUFFICIENCY OF EVIDENCE

Laine argues that the State presented insufficient evidence to convict him of vehicular homicide by driving in a reckless manner. We disagree.

1. Standard of Review

The test for determining the sufficiency of evidence is whether any rational trier of fact could find the elements of the charged crime beyond a reasonable doubt after viewing the evidence in a light most favorable to the State. *State v. Scanlan*, 193 Wn.2d 753, 770, 445 P.3d 960 (2019). We resolve all reasonable inferences based on the evidence in favor of the State and interpret inferences most strongly against the defendant. *Id.* Circumstantial and direct evidence are equally reliable. *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017).

2. Legal Principles

RCW 46.61.520 states,

> (1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:
> . . . .
>
> (b) In a reckless manner; or
>
> (c) With disregard for the safety of others.

As noted above, the State charged Laine under both subsection (b) and (c).

Driving in a reckless manner for purposes of RCW 46.61.520(1)(b) means, "to operate a vehicle in a rash or heedless manner, indifferent to the consequences." *State v. Roggenkamp*, 153 Wn.2d 614, 631, 106 P.3d 196 (2005) (internal quotations omitted).[1] And driving with disregard for the safety of others "is an aggravated kind of negligence 'falling short of recklessness but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term "negligence." ' " *State v. Lopez*, 93 Wn. App. 619, 623, 970 P.2d 765 (1999) (quoting *State v. Eike*, 72 Wn.2d 760, 765-66, 435 P.2d 680 (1967)).

Laine emphasizes that there is a significant difference between the standard range sentence for vehicular homicide by driving in a reckless manner and vehicular homicide by driving with disregard for the safety of others. Driving in a reckless manner has a seriousness level of XI, RCW 9.94A.515, with a standard range sentence for a defendant with no criminal history of 78 to 102 months. RCW 9.94A.510. Driving with disregard for the safety of others has a seriousness level of VII, RCW 9.94A.515, with a standard range sentence for a defendant with no criminal history of 15 to 20 months. RCW 9.94A.510.

3. Relevant Cases

Laine asserts that the Washington cases affirming vehicular homicide convictions based on driving in a reckless manner all involved something more than repeatedly driving across the center line. He cites several cases as examples. *See State v. Hill*, 48 Wn. App. 344, 345, 739 P.2d 707 (1987) (defendant drove north in southbound lanes on Interstate 82 and collided with an oncoming car); *State v. Hanna*, 123 Wn.2d 704, 706-07, 871 P.2d 135 (1994) (defendant

[1] The Supreme Court in *Roggenkamp* expressly held that the definition of "in a reckless manner" is different than the definition of "reckless driving" in RCW 46.61.500(1). 153 Wn.2d at 618, 630.

travelled 80 to 100 miles per hour and was racing or chasing another car when he crossed a grass median into opposing traffic and collided with an oncoming car); *State v. Kenyon*, 123 Wn.2d 720, 722, 871 P.2d 144 (1994) (defendant drove over the speed limit with three different sized tires and swerved all over the road before colliding with another vehicle); *State v. Randhawa*, 133 Wn.2d 67, 70-72, 941 P.2d 661 (1997) (defendant had been drinking alcoholic beverages and was exceeding the speed limit when he lost control as he was negotiating a curve).

He also cites to *Lopez*, 93 Wn. App. 619. In *Lopez*, the defendant was 14 years old and drove a car with three friends. 93 Wn. App. at 621. The defendant was driving between 51 and 54 miles per hour on a road with a speed limit of 50 miles per hour. *Id.* The car left the lane and the defendant overcorrected, causing the car to roll and killing one of the passengers. *Id.* There was no evidence of substance abuse, horseplay, or other reckless conduct leading to the accident. *Id.*

The State charged the defendant with vehicular homicide by driving in a reckless manner and/or with disregard for the safety of others. *Id.* at 621-22. The trial court ruled that the State failed to establish recklessness or disregard for safety and dismissed the case. *Id.* at 622. On appeal, the court held that being a minor and an unlicensed driver was not enough to establish a disregard for the safety of others and affirmed the trial court's dismissal of the case. *Id.* at 623-24.

Laine notes that no Washington case holds that weaving into the oncoming lane several times, in the absence of any other unlawful driving, constitutes driving in a reckless manner.

4. Analysis

Here, there was no indication that Laine engaged in conduct "typical" of driving in a reckless manner. There was no evidence that he was impaired by alcohol or drugs. He was not

speeding. He did not disregard traffic signals. He was not racing or chasing another vehicle. He was not engaged in horseplay. He was not texting or on his phone.

But both Caton and Williams witnessed Laine driving erratically for a lengthy period. They saw him swerve out of his lane between six and 10 times in the span of five to 15 minutes. He went over the center line into the opposite lane and over the fog line on the right, almost hitting a light pole or a mailbox. Caton's cell phone video showed Laine's truck do more than just drift slightly out of its lane; Laine was driving over the center line and was almost entirely in the opposite lane for almost four seconds. Williams was so alarmed by Laine's driving that she repeatedly honked her horn and flashed her lights, but Laine apparently did not notice.

Laine urges this court to hold as a matter of law that this type of erratic driving cannot constitute driving in a reckless manner. He concedes a jury could find that he drove with disregard for the safety of others – "an aggravated kind of negligence." *Lopez*, 93 Wn. App. at 623. But he argues that driving in a reckless manner requires significantly greater proof than ordinary negligence. He claims that the legislature recognized this higher level of proof because the punishment for vehicular homicide by driving in a reckless manner is five times greater than the punishment for driving with disregard for the safety of others. *See* RCW 9.94A.510, .515.

Laine argues that deviating from his lane six to 10 times over a period of five to 15 minutes while not driving unlawfully in any other way is not driving in a "rash or heedless manner, indifferent to the consequences." *Roggenkamp*, 153 Wn.2d at 631. Instead, he claims that he merely was inattentive, inadvertently letting his mind wander while driving down a familiar road. Laine contends that inattentiveness without evidence of other unlawful driving may be sufficient to show gross negligence, but it is not sufficient to establish driving in a reckless manner.

The State emphasizes that the collision was not an isolated event, but was the consequence of Laine's inability to control his truck over a 10 to 15 minute period. The State notes that the video showed that Laine drove in the oncoming lane for several seconds rather than quickly recovering. The State argues that Laine was aware that he could not keep his truck in his lane because he was having a mental health crisis, and it was rash and heedless and indifferent to the consequences for him to keep driving rather than pulling over.

There are no Washington cases that are directly comparable to the facts in this case. Laine relies on *Lopez*, but the accident in that case was caused by the one and only time the defendant left her lane. 93 Wn. App. at 621. Laine left his lane numerous times throughout the five to 15 minutes leading up to the accident.

The question for this court is whether any rational trier of fact could find beyond a reasonable doubt that Laine was driving in a reckless manner, viewing the evidence and all reasonable inferences in the light most favorable to the State. *Scanlan*, 193 Wn.2d at 770. We conclude that under these facts, a rational jury could find that the inability to stay in the correct lane for an extended period of time, including driving completely in the oncoming lane for almost four seconds, constituted driving in a "rash or heedless manner, indifferent to the consequences." *Roggenkamp*, 153 Wn.2d at 631.

Therefore, we hold that the evidence was sufficient to establish that Laine was driving in a reckless manner.

B. PROSECUTORIAL MISCONDUCT

Laine argues that the prosecutor engaged in misconduct during closing argument by improperly inflaming the jury's passions and arguing facts outside the record. We conclude that Laine's claims fail.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of all the circumstances of the trial. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022). Our analysis considers "the context of the case, the arguments as a whole, the evidence presented, and the jury instructions." *State v. Slater*, 197 Wn.2d 660, 681, 486 P.3d 873 (2021). To show prejudice, the defendant is required to show a substantial likelihood that the misconduct affected the jury verdict. *Id.*

However, when the defendant fails to object at trial, a heightened standard of review requires the defendant to show that the conduct was " 'so flagrant and ill intentioned that [a jury] instruction would not have cured the [resulting] prejudice.' " *Zamora*, 199 Wn.2d at 709 (alteration in original) (quoting *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020)). "In other words, the defendant who did not object must show the improper conduct resulted in *incurable* prejudice." *Zamora*, 199 Wn.2d at 709. If a defendant fails to make this showing, the prosecutorial misconduct claim is waived. *Slater*, 197 Wn.2d at 681.

Courts have found flagrant and ill-intentioned conduct in a "narrow set of cases," including "where the prosecutor otherwise comments on the evidence in an inflammatory manner." *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 170, 410 P.3d 1142 (2018). And it is less likely that improper statements will cause incurable prejudice when they do not have an inflammatory effect. *See State v. Emery*, 174 Wn.2d 741, 762-63, 278 P.3d 653 (2012). The defendant "must show that the prejudice was so inflammatory that it could not have been defused by an instruction." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

2. Reference to the Deceased Boy's Age

Laine argues that the prosecutor improperly inflamed the jury's passions by referring to the Gaven's age when arguing that Laine's driving was reckless. We disagree.

A prosecutor cannot use arguments to inflame the jury's passions or prejudices. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). "A prosecutor commits misconduct by asking jurors to convict based on their emotions rather than the evidence." *State v. Lucas-Vicente*, 22 Wn. App. 2d 212, 224, 510 P.3d 1006 (2022). However, the prosecutor has wide latitude to assert reasonable inferences from the evidence. *Id.*

Here, during closing argument, the prosecutor stated, "And I keep hammering home the reckless driving because we know we have the evidence of who passed away. An 11-year-old boy sitting in the passenger seat." RP at 440. Laine claims that the prosecutor essentially was arguing that that the decedent's young age made Laine's conduct reckless.

But this comment was brief – the prosecutor only mentioned Gaven's age once – and it referred to an undisputed fact. There was testimony that Gaven was 11 years old at the time of the accident. And the jury already knew that Gaven was a young boy based on the testimony of several witnesses and because photographs of the boy were admitted and shown to the jury at trial, without objection from Laine. In fact, Laine himself mentioned Gaven's age during his closing argument.

Laine relies on *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001) to argue that referring to the victim's age is inherently prejudicial. In *Clark*, the court stated that evidence that a crime victim was four years old was prejudicial and that the jury could not possibly have disregarded that evidence. *Id.* at 783. But the evidence related to the victim in a prior kidnapping conviction, and the victim's age was admitted in the death penalty phase after the

defendant had been convicted of kidnapping and murdering a seven-year-old girl. *Id.* at 738, 777. This case does not involve similar facts.

We conclude that the prosecutor's statement did not improperly inflame the jury's passions.[2] Therefore, we hold that Laine's challenge to the prosecutor's comment about Gaven's age fails.

3. Evidence Outside the Record

Laine argues that the prosecutor improperly argued evidence outside the record by stating that the damage to the vehicles was evidence of recklessness. We conclude that the argument was not improper.

It is error for a prosecutor to mislead the jury by misstating the evidence presented at trial. *State v. Meza*, 26 Wn. App. 2d 604, 620, 529 P.3d 398 (2023). And a prosecutor commits misconduct by encouraging the jury to consider evidence that is outside of the record. *State v. Teas*, 10 Wn. App. 2d 111, 128, 447 P.3d 606 (2019). However, a prosecutor has wide latitude to assert reasonable inferences from the evidence. *Meza*, 26 Wn. App. 2d at 620.

Here, during closing argument, the prosecutor stated,

> You get the photographs of the collision. That's not just mere negligence with how much damage, right? So look at Mr. Laine's truck. If this would have been a scenario where a simple serve out of the way, swerve back into your lane, you wouldn't have such a head-on collision. . . . So that shows how reckless he is just from the sheer damage of the vehicles.

RP at 439-40. Laine argues that there was no evidence regarding reconstruction of the accident or expert testimony that would support this argument.

[2] Even if the prosecutor's reference to Gaven's age during closing argument had been improper, Laine waived this claim by not objecting to the remark. If Laine had objected, the trial court could have stricken the comment and asked the jury to disregard it. The comment was not so inflammatory that it could not be "defused by an instruction." *Dhaliwal*, 150 Wn.2d at 578.

However, there was testimony from Williams that Laine "smashed head on" into the Jeep. RP at 140. Caton testified that Laine went "into the other lane completely." RP at 118. And the photographs admitted as exhibits showed extensive damage to both vehicles. From this evidence, the prosecutor argued that Laine was reckless because the damage to the vehicles – as well as the testimony – showed that Laine was completely in the oncoming lane rather than merely swerving in and out of that lane. The prosecutor did not need expert testimony to comment on the damage that was obvious from the photographs.

We conclude that this argument was not improper.[3] Therefore, we hold that Laine's challenge to the prosecutor's comment about damage to the vehicles fails.

4. Cumulative Misconduct

Laine briefly argues that the cumulative effect of the prosecutor's improper conduct affected the jury's verdict. We disagree.

Under the cumulative error doctrine, the defendant must show that the combined effect of multiple errors requires a new trial. *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). The cumulative effect of repeated prosecutorial conduct may be so flagrant that no instruction can erase the combined prejudicial effect. *Glasmann*, 175 Wn.2d at 707.

Here, Laine cannot show that the challenged comments were improper or that they resulted in prejudice. Accordingly, we hold that Laine's claim of cumulative error fails.

CONCLUSION

We affirm Laine's conviction of vehicular homicide by driving in a reckless manner.

[3] Even if the argument was improper, Laine did not object to these statements. And he cannot show that the statements were flagrant and ill-intentioned or that a jury instruction could not have cured any prejudice.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

CRUSER, C.J.

VELJACIC, J.

Filed
Washington State
Court of Appeals
Division Two

January 28, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GEORGE ROBERT LAINE, Appellant.	No. 58497-2-II ORDER DENYING MOTION TO PUBLISH

Appellant moves to publish this court's opinion dated November 21, 2024, in this case. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Cruser, Veljacic

FOR THE COURT:

Maxa, J.

MAXA, J.

DECLARATION OF SERVICE

On said day below, I had electronically delivered a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division II Cause No. 58497-2 to the following parties:

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Original electronically delivered via appellate portal to:
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Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 27, 2025 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

February 27, 2025 - 9:16 AM

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Superior Court Case Number:	22-1-00083-8

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