IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. Barbara Quintana, Appellant.	No. 41098-2-II UNPUBLISHED OPINION

Hunt, J. – Barbara Quintana appeals her jury trial conviction for vehicular assault. She argues that (1) the trial court violated her right to be present at all critical stages of her trial; (2) the trial court erred in failing to suppress a photograph of her bruised and naked torso because it resulted from an unlawful search when a Washington State Patrol detective took the photograph without her consent, while she was lying unconscious in a hospital bed, suspected of, but not under arrest for, vehicular assault; (3) there was insufficient evidence to support her vehicular assault conviction; (4) the trial court failed to give a necessary unanimity instruction; and (5) she received ineffective assistance of counsel. In her Statement of Additional Grounds (SAG),[1] Quintana advances a different ineffective assistance of counsel theory and also contends that the

[1] RAP 10.10(a).

"prosecutor impeached his own witnesses." SAG at 1. We affirm.

FACTS

I. Vehicular Assault

A. High-Speed Single-Vehicle Crash

Standing in front of the Skokomish Department of Public Safety's annex building around 6:00 p.m. on August 23, 2009, Officer Timothy Smith and Sergeant Chris Newton observed a green Chevrolet Blazer driving between 80 and 90 miles per hour on an adjacent road in a 35-mile-per-hour speed zone and onto a highway. Newton believed he observed an adult male in the driver's seat, but he was unable to make out the passenger's features.[2] As Newton and Smith gave chase in their patrol vehicles, the Blazer struck a utility pole north of the annex building.

Newton arrived at the scene one to three minutes after the Blazer had driven past the annex building and observed a male "climbing . . . almost exiting on the way out of the driver's side window,"[3] with "basically almost . . . one foot on the ground and the other foot coming—and [his] entire body and foot was coming out of the window." II Verbatim Report of Proceedings (VRP) at 139. When the man, later identified as Dion Obi, finally exited the vehicle, he fell down, stood up, and attempted to flee.

Newton ran after Obi and threatened him with a Taser gun. Obi got down on the ground. Barbara Quintana "came from around the passenger side of the vehicle from the front," "yelling

[2] Smith did not observe either the driver or the passenger.

[3] II Verbatim Report of Proceedings (VRP) at 138.

and screaming";[4] Newton, who could not see the vehicle's passenger side from where he was standing, had not previously seen Quintana. Hearing "yelling and screaming from inside of the vehicle," Newton observed David Wahwassuck in a rear passenger seat with an apparently broken leg or ankle. II VRP at 144.

Officer Smith arrived shortly thereafter and observed Quintana "[s]itting at the passenger seat of the vehicle" with "her feet extended out" of the ajar passenger door and Obi "approximately thirty feet from the vehicle on the . . . driver's rear corner," "lying on his back unconscious." II VRP at 122. The driver's side front door was closed. Obi had a large laceration near his left ear and blood on his neck and clothing. When Obi regained consciousness, he was "pretty disoriented" and "[c]ouldn't tell [Officer Smith] what happened or why he was injured and on the ground." II VRP at 123. Smith observed a partially-full can of beer underneath Obi, who was placed under arrest sometime before 8:00 p.m.

At roughly 7:00 p.m., some 35-40 minutes after the crash, Washington State Patrol (WSP) Trooper Aaron Bidewell arrived, by which time Quintana and Obi "had already been removed" from the scene. II VRP at 168. Bidewell believed that Wahwassuck, still in the crashed Blazer, had a compound leg fracture. A volunteer firefighter advised Smith that, when he (the firefighter) was treating Wahwassuck, he "located beside [Wahwassuck] a half-full bottle of Bacardi." II VRP at 127. Newton provided Bidewell with the Blazer's occupants' names and told Bidewell that he (Newton) believed Obi had been driving at the time of the crash. Bidewell "relayed"[5]

[4] II VRP at 141.
[5] II VRP at 170.

Newton's conclusion to a "Trooper Merritt,"[6] from the upcoming WSP shift; either Bidewell or "scene supervisor" Sergeant Connolly[7] (by then also present at the crash site) asked Merritt to "respond to the hospital for a blood draw based on Mr. Obi being the driver at the time for a vehicular assault." II VRP at 227-28.

Bidewell also examined the crashed Blazer, "smell[ed] a strong odor of intoxicants,"[8] and observed "a set of lady's shoes in the front of [the driver's] seat" and "a set of men's . . . tan work boots" on the vehicle's passenger side roof. II VRP at 170. Around 7:45 p.m., WSP Corporal Debbie Laur arrived and conducted a collision investigation. By that time, emergency response personnel had transported Wahwassuck to a hospital.

Around 8:00 p.m., WSP Detective Brian George[9] arrived and was advised that one of the two initially responding Skokomish police officers had told a WSP trooper that Obi had been driving and had seen Obi exiting the Blazer after the crash. George left the crash scene and arrived at the hospital to which emergency personnel had transported Obi and Quintana. At that time, George was "focusing" on Obi as a suspect and believed that Quintana had been a passenger. II VRP at 228.

B. Investigation

[6] II VRP at 174. The record does contain Merritt's first name and we intend no disrespect by omitting his first name.

[7] The record does contain Connolly's first name, either.

[8] II VRP at 169.

[9] About a month before trial, the WSP had promoted George to sergeant. To avoid confusion, we refer to him as Detective George, his rank at the time of events in this case, even when we describe his trial testimony. We intend no disrespect.

1. At hospital

The hospital staff had given Quintana several drugs, including morphine. George found Quintana intubated, heavily sedated, "basically unconscious," and unable to talk. I VRP at 26. George filled out a consent authorization for Quintana's medical release form, which contained a preprinted line reading, "The information will be used on my [Quintana's] behalf for the following purpose"[10]; at the end of this line, George wrote, "collision report."[11] I VRP at 30. George left the completed form with Trooper Merritt, who was at the hospital.

Aware that emergency response personnel had reported bruising just below Quintana's breast line, George asked the emergency room physician whether Quintana had bruising on her chest. In response, the physician removed a blanket covering the unconscious Quintana's bruised chest, after which George photographed Quintana's face and naked upper torso. George also viewed and photographed Obi's face and one of his knees.

Around 5:00 a.m. the following morning, August 24, WSP Trooper Jason Roe arrived at the hospital to relieve Merritt from his shift. Merritt told Roe that Obi was the suspect driver and was unconscious and that Quintana was believed to have been a passenger and was also unconscious. Merritt also gave the medical release authorization form to Roe and told him to try to obtain Quintana's signature. Several hours later, Quintana woke up; Roe showed her the form and explained that it was a medical release form and that her signature would "release her medical information regarding the collision to help with [the WSP's] investigation." I VRP at 36.

[10] I VRP at 29-30.

[11] George wrote nothing about using these medical records for criminal investigation purposes.

Quintana nodded her head in response to the explanation, but she did not sign the form.

One and a half hours later, Roe returned to Quintana's hospital room. The hospital staff had removed the tubes from Quintana, and she was awake and able to answer Roe's questions. Quintana signed the medical release form. Roe also spoke to Obi, who denied having driven the Blazer the night before. Hospital staff collected blood samples from both Obi and Quintana. From Obi they took both a "medical" blood sample (physician-ordered) and a "legal" blood sample (WSP-ordered). II VRP at 263. At WSP's request, the hospital staff also took a "legal" blood sample from Quintana,[12] after which, at some point, Obi was transferred from the hospital to jail. II VRP at 263.

2. Forensic

Unconvinced that Obi had been driving, George investigated further. He had observed blood inside the Blazer and that its windshield had been "crushed, based on the person in the passenger seat [striking] the windshield of the vehicle"; and he anticipated that the passenger had left behind "trace evidence" such as hair. II VRP at 229. After George obtained and executed a search warrant to recover trace evidence from the Blazer, crime lab technicians recovered hair from the passenger-side windshield. George believed this hair was short-length male facial hair; aware that Obi had facial fair at the time of the crash, George told the prosecutor's office that he no longer believed Obi had been the driver. Obi was released from custody.[13]

[12] The laboratory assistant took only a "legal draw" blood sample from Quintana. II VRP at 263. Although there was no express testimony that hospital staff also took a "medical draw" blood sample from Quintana, we note it was likely taken as standard procedure.

[13] Before Obi was released, however, a WSP detective asked Obi while he was still in jail for hair samples, and Obi agreed to provide them.

George sent blood and hair samples from inside the Blazer, including from the passenger-side windshield, to the WSP Crime Lab. In October, Quintana arrived at the WSP office and met with George to retrieve her personal property recovered from the accident scene. George used swabs to take samples from Quintana to determine her DNA profile to compare with the blood and hair evidence from the Blazer. WSP Crime Lab testing established that blood from the Blazer's steering wheel matched Quintana's DNA profile and that tissue taken from the passenger-side windshield matched Obi's DNA profile.

II. Procedure

The State charged Quintana with vehicular assault of Wahwassuck under RCW 46.61.522.

A. Pretrial CrR 3.6 Hearing

Quintana moved in limine to exclude her medical records based on the invalidity of her consent while injured and sedated in the hospital shortly after the accident.[14] The trial court ruled, "Because [Quintana] was heavily sedated at the time that she gave Trooper Roe consent to her medical records, the court finds that her consent was not voluntary, and therefore her medical records, except for the blood evidence, are not admissible." Clerk's Papers (CP) at 80. This evidence was neither offered nor admitted at trial.[15]

But the trial court rejected Quintana's argument that it should also exclude her blood

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[14] The trial court also conducted a CrR 3.5 hearing on the admissibility of Quintana's statements to law enforcement. But the parties do not challenge the trial court's CrR 3.5 ruling on appeal.

[15] The State does not cross appeal the trial court's exclusion of this evidence.

evidence. The trial court concluded that, under *State v. Smith*,[16] Quintana's "blood sample and the results of any tests revealing intoxicants in the blood are not privileged and are admissible." CP at 80-81.

[16] 84 Wn. App. 813, 929 P.2d 1191, *review denied*, 133 Wn.2d 1005 (1997).

B. Jury Selection

The trial court brought the entire jury venire into the courtroom, read aloud the list of potential witnesses, and asked general questions. Then the trial court removed the venire, called individual jurors into the courtroom "based upon raised cards during general questioning," and excused four jurors for cause. I VRP at 102. The trial court called the entire jury venire back into the courtroom, advised the venire of the anticipated length of trial, and excused six jurors because of time constraints. The State and Quintana then conducted voir dire of the jurors, and the trial court excused four more jurors for cause based on time constraints.

After the trial court temporarily removed the remaining jury venire from the courtroom, Quintana and the State expressed concern about the voir dire process leading to "gamesmanship." I VRP at 104. Quintana was concerned that one party could repeatedly accept the jury panel while the other party repeatedly used peremptory challenges to remove jurors:

> So, I can say I accept the panel, he says I excused number so-and-so. Then I can . . . accept the panel, and he says I excuse so-and-so. And I could do that six times. Six times I could tell that jury, I like you, he doesn't and it would hurt him. And he could do the same to me. . . . He could make a strategical decision to just say, I'm accepting the panel so that—because I know that [the other party] is going to kick off four people. . . . [I]t's just not appropriate; it's prejudicial—it leads to gamesmanship and—and not an appropriate way to use voir dire.

I VRP at 104. The State expressed a different concern:

> But my concern, though, mainly is these jurors, while . . . they're out in the hallway talking and mingling with each other, they're talking to each other and they think that juror Harriet is a really nice person. And then [Quintana] or [the State] excuses juror Harriet and they're thinking to themselves, that was a nice person, why did they get rid of her? And all of the sudden, you know, there is a subtle bias against the attorney and that's not healthy for either side.

I VRP at 104-05.

After further discussion, the trial court called the jury venire back into the courtroom, the trial court "discuss[ed] peremptories at sidebar" with counsel, "explain[ed] peremptory process" and excused 12 jurors, and seated the jury panel. I VRP at 106. When the trial court released the jury panel for the evening, the trial court put on the record which jurors had been excused with peremptory challenges.

C. Trial

1. Photo of Quintana's bruised chest

Outside the jury's presence, Quintana's counsel (1) advised the trial court that the State intended to introduce a photograph of Quintana, "naked from the waist up," which George had taken while Quintana was unconscious at the hospital; and (2) "strong[ly] object[ed]" to admission of this evidence. II VRP at 153. She objected that the State could not "take naked pictures of someone unconscious without violating their rights." II VRP at 157.

The State responded (1) that the photo was relevant because it depicted a bruise on Quintana's chest that was "consistent with impact with a steering wheel"[17]; and (2) that George's photographing Quintana was not a search because taking this photo at the hospital was no different than taking a photograph of Quintana unconscious at the accident scene and it was "not [an] invasion of privacy." II VRP at 158. The State also made an offer of proof, explaining how George had taken the photo after asking the doctor to move the blanket covering Quintana.

Quintana advised the trial court, "I would like to make a record as to why . . . it's an impermissible and unconstitutional search under the case law." II VRP at 177. When the trial

[17] I VRP at 155.

court assented, Quintana stated:

> According to Detective George's report, at 8:20 [p.m.] on August 23rd he was on scene and investigating the accident. He was informed between 8:20 and 8:30 that there were conflicting reports of who [was] the driver of the collision[.] The passenger seated in the rear of the Blazer advised [that] the female was driving at the time of the collision.
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> At approximately 8:55, [Detective George] goes to the emergency room and he enters emergency room 164, which is the room of [ ]Quintana. She was intubated and not conscious. Trooper Merritt [who was already at the hospital] advised he was told by the fire personnel that Ms. Quintana had bruising across the front of her chest just below her breast line. [Detective George] spoke with her doctor, he advised [Detective George that] he[the doctor] hadn't seen any bruising but agreed to check. [The doctor] came into the room with [Detective George] to check. [The doctor and Detective George] located and photographed bruising across [Quintana's] chest.
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> . . .
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> [T]here is a zone of privacy in a hospital room. [Detective George was] investigating a crime because he already ha[d] knowledge that there [were] conflicting reports about who was driving.

II VRP at 178.

As before, the State maintained that photographing Quintana's naked torso was not an inadmissible search because "[v]ictims get photographed all the time" and "[t]hat's accepted police procedure and it was documenting an injury." II VRP at 179. Denying Quintana's motion to suppress, the trial court ruled that (1) although "[t]echnically, . . . it would constitute a search,"[18] the photographic intrusion was minimal, similar to other standard requests for the defendant's fingerprints, other photographs, blood and hair samples, and field sobriety tests; and (2) even without the photograph in evidence, "a doctor would be allowed to testify that [Quintana], in fact, had bruising." II VRP at 181.

[18] II VRP at 180.

Later, in the jury's presence, George identified the photograph he had taken of Quintana's bruised bare chest and testified that, based on his training in "occupant kinematics,"[19] the bruising was "consistent with having impact with the steering wheel." II VRP at 250. The trial court admitted the photograph,[20] and the State showed it to the jury.

2. State's witnesses

With the jury in the courtroom, Newton testified that (1) he had seen an adult male driving the Blazer and exiting the driver's side window, and (2) the State's "belie[f] that Ms. Quintana was driving the vehicle because of some DNA evidence" did not change his "perception of what [he] saw that day." II VRP at 151. Trooper Bidewell testified that (1) when Sergeant Newton had told him that Obi was driving, he (Bidewell) "[went] along"[21] with Newton's conclusion; and (2) he (Bidewell) did not know whether the women's shoes were in the front seat after the crash or whether the medics had placed the shoes there.

Wahwassuck, the back seat passenger in the Blazer when it crashed, testified that he had been drinking with Quintana before the accident, and that she had been driving the Blazer dangerously right before the crash. He suffered a broken leg in the crash. On cross-examination,

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[19] "Occupant kinematics" is "the relationship between injuries on the body and contact inside the passenger compartment of the vehicle" and includes studying "injuries sustained from a steering wheel and the bruises they leave." II VRP at 250.

[20] The trial court also admitted (1) another photograph of Quintana that George had taken at the hospital on the night of the crash, showing Quintana's face and depicting blood near her nose; (2) a photograph of Obi, showing facial hair and "cuts on his face as consistent with impacting a windshield"; and (3) a photograph of Obi's knee. II VRP at 248. These photographs, however, are not at issue on appeal.

[21] II VRP at 171.

Quintana elicited from Wahwassuck that he had drunk half a bottle of liquor before getting into the Blazer and that he had previous convictions for theft and trafficking in stolen property.

Debbie Laur, the WSP collision investigator for this crash, and the lead collision instructor at the WSP Academy, testified that she could not estimate the actual speed at which the Blazer had been traveling at the time of the crash because it did not leave enough tire marks on the dry pavement. Nevertheless, she opined that (1) the Blazer had been traveling *at least* 40 miles per hour at the time of the crash, which occurred while it was still daylight; (2) the crash was caused by "[t]he vehicle . . . going too fast for the roadway surfaces to keep the vehicle on the roadway"[22]; and (3) based on her reconstruction of the accident, it would have been physically impossible for the person sitting in the driver's seat to have impacted the windshield on the passenger side.

WSP Detective David Brian Killeen testified that he had traveled to the Skokomish Department of Public Safety's annex building and stood at the location where Smith and Newton had been standing when they had observed the speeding Blazer. Based on the Blazer's estimated speed and the length of the road that Smith and Newton could actually observe from where they were standing, Killeen estimated that Newton had about 0.145 seconds during which to make his observation that a male was driving the Blazer.

3. Blood and DNA evidence

WSP forensic scientist Kari O'Neill testified that she had taken two blood samples from the Blazer's steering wheel four days after the crash. The first sample was "a blood stain with

[22] II VRP at 198.

associated flow,"[23] meaning that the blood did not fall from some point above the steering wheel, but rather the blood was "deposit[ed]"[24] on the steering wheel and then trickled down[25]; this steering wheel blood sample with associated flow matched Quintana's DNA profile. According to O'Neill, the estimated probability of selecting a different, unrelated individual at random from the United States with a matching profile population was extremely low. From the interior passenger side of the windshield, O'Neill had taken a sample of what appeared to be skin, which sample matched Obi's DNA profile; and, according to O'Neill, the estimated probability of finding another matching profile also was extremely low. The State also called a witness who testified that Quintana's blood alcohol concentration had tested above the legal limit on the night of the crash.[26]

4. Defense witnesses

Quintana did not testify, but she called a witness who testified that, sometime between August 21 and 31, 2009, she had seen Quintana sitting in the passenger seat of an unspecified vehicle travelling at a high rate of speed. Another defense witness testified that he had seen Quintana sitting in the passenger seat of an unidentified vehicle driven by a man around 4:00 p.m. on August 23, 2009.

D. Instructions, Verdict, Sentence, Appeal

The trial court instructed the jury that it could convict Quintana of vehicular assault under

[23] III VRP at 319.

[24] III VRP at 321.

[25] The second blood sample was simply a "spatter stain[]." III VRP at 328.
[26] Under RCW 46.61.502(1), the legal blood alcohol concentration limit is 0.08.

two alternative means: (1) driving a vehicle in a reckless manner, or (2) being under the influence of intoxicating liquor. Quintana did not request, nor did the trial court give, an alternative means unanimity instruction; nor did she object to the absence of such instruction.

The jury found Quintana guilty of vehicular assault. The trial court sentenced her to 16 months of confinement, with credit for time served, and 17 months of community custody. She appeals her conviction, sentence, and criminal history.[27]

ANALYSIS

I. Sidebar during Jury Selection

Quintana first argues that the trial court's sidebar discussion with counsel about peremptory challenges violated her right to be present at all critical stages of her trial. This argument fails.

A. Standard of Review

We review de novo the question of whether a trial court violated a defendant's constitutional right to be present during his trial. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). The Sixth Amendment and the Due Process Clause of the Fourth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the "fundamental right to be present at all critical stages of a trial." *Irby*, 170 Wn.2d at 880; *see also United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); U.S. Const. amend. VI; Const. art. I, § 22.

The due process right to be present "'extends to jury voir dire.'" *Irby*, 170 Wn.2d at 883

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[27] Although Quintana assigned error to her sentence and criminal history, her briefing does not address them.

(quoting *State v. Wilson*, 141 Wn. App. 597, 604, 171 P.3d 501 (2007)). The defendant's presence at voir dire "'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" *Irby*, 170 Wn.2d at 883 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

B. *Irby* Inapplicable

Quintana does not argue that she was absent during voir dire; nor could she, because the record shows that she was at all times present. *See* 1 VRP at 102. Instead, Quintana contends that the trial court violated her right to be present because she was "in no way privy" to counsel's sidebar discussion about peremptory challenges. Br. of Appellant at 10. The record shows that this discussion involved counsel's advising the trial court which jurors counsel had already decided to excuse using their respective peremptory challenges. After this sidebar, the trial court brought the venire back into the courtroom and both parties exercised their peremptory challenges on the record in open court and in Quintana's presence.[28] Nothing in the record before us suggests that Quintana was thwarted from involving herself in her counsel's use of peremptory challenges, either by conferring with counsel before the sidebar or after the sidebar when counsel actually exercised her peremptory challenges in her presence. In short, the sidebar discussion did

[28] Before the jury venire returned to the courtroom, Quintana's counsel asked the trial court if the parties could "give you our peremptories now . . . and then you can call the jury in [and] you can tell them who the jury is." 1 VRP at 105-06. When the State objected, Quintana's counsel acquiesced.

not deprive Quintana of the "power . . . to give advice or suggestion or even to supersede" her counsel. *Irby*, 170 Wn.2d at 883.

Quintana's reliance on *Irby* to support her argument fails because the facts are easily distinquishable. With both defense counsel and Irby absent from the courtroom, the trial court gave prospective jurors a juror questionnaire. *Irby*, 170 Wn.2d at 877. The trial court emailed counsel about 10 different jurors, including a juror with a business hardship and 4 other jurors who "had a parent murdered,"[29] asking, "Any thoughts? If we're going to let any go, I'd like to do it today." *Irby*, 170 Wn.2d at 878. Within an hour, Irby's trial counsel emailed, agreeing to releasing all 10 jurors; the State, also via email, agreed to release 7 jurors. *Irby*, 170 Wn.2d at 878. The trial court responded with another email, stating that counsel had stipulated to releasing the seven agreed-upon jurors. *Irby*, 170 Wn.2d at 878. The clerk's minutes also read: "In chambers not on the record. Counsel stipulate[ed] to excusing the following jurors for cause: #7, 17, 23, 42, 53, 59 & 77." *Irby*, 170 Wn.2d at 878.

Irby, however, was in custody, apart from his counsel, during these events, not in open court; "and there [wa]s no indication in the [clerk's minutes] or elsewhere in the record . . . that Irby was consulted about the dismissal of any of the jurors." *Irby*, 170 Wn.2d at 878. Our Supreme Court held that the trial court violated the defendant's right to be present at all critical stages of his trial because (1) Irby was not present during the trial court's email discussions with counsel; and (2) "it is unlikely that the attorneys spoke to Irby about the email in the interim." *Irby*, 170 Wn.2d at 884.

[29] Irby was charged with first degree burglary and first degree murder with aggravating circumstances or, alternatively, first degree felony murder. *Irby*, 170 Wn.2d at 877.

Unlike Irby, Quintana was not in custody during voir dire; on the contrary, she was in the courtroom with her counsel during the entire voir dire, including before and after the sidebar, and, most importantly, when her counsel actually exercised her peremptory challenges and excused several jurors. Quintana points to nothing in the record or in the law that the sidebar discussion here was a critical stage of her trial and that in failing sua sponte to invite her active participation in the sidebar, the trial court violated her right to be present during voir dire.

II. Evidence

A. Admissibility

Quintana next contends that the following evidence was illegally obtained and, therefore, inadmissible: (1) George's photograph of her bruised naked chest, which he took without a warrant and without her knowledge or consent, while she was unconscious in her hospital bed and suspected of, but not under arrest for, driving the Blazer during the accident; (2) her blood sample that the WSP took at the hospital without her consent and without a warrant, when she was not under arrest; and (3) the cheek swab to obtain her DNA sample at the WSP office.

1. Standard of review

We review for abuse of discretion trial court rulings on the admissibility of evidence. *State v. Ramirez-Estevez*, 164 Wn. App. 284, 289, 263 P.3d 1257 (2011). A constitutional evidentiary error, including admission of "fruit of the poisonous tree,"[30] may be harmless if we are convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). This analysis

[30] *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

requires application of the "'overwhelming untainted evidence'"[31] test, which asks whether "the untainted evidence . . . is so overwhelming that it necessarily leads to a finding of guilt." *Thompson*, 151 Wn.2d at 808. Such is the case here.

2. Photograph of Quintana's bruised chest

We do not address the legality of George's photographing Quintana's bruised chest while she was unconscious at the hospital because, even assuming, without deciding, that the photo was unlawfully taken and that the trial court erred in admitting it into evidence, any error was harmless. The State offered the photograph to establish that Quintana had been driving the Blazer when it crashed, an inference that the jury could draw from the asserted "steering wheel" shape of the bruising. But even without this photograph, the State introduced ample other evidence to prove that Quintana was the driver of the Blazer.

Forensic scientist O'Neill testified that DNA in the blood taken from the steering wheel matched Quintana's DNA profile (obtained from her later cheek swab) and that tissue from the passenger's side windshield matched Obi's DNA profile. The lead WSP academy collision instructor, Laur, testified that, based on her reconstruction of the accident, it would have been impossible for the person sitting in the driver's seat to have impacted the windshield above the passenger side of the Blazer. This expert evidence was consistent with testimony from the sole eyewitness to the accident, the Blazer's backseat passenger, Wahwassuck, who stated that

[31] *Thompson*, 151 Wn.2d at 808 (quoting *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)).

Quintana had been driving at the time of the crash.[32] Even if the trial court had suppressed the photograph, this significant other evidence is convincing beyond a reasonable doubt that any reasonable jury would have concluded Quintana was driving the Blazer at the time of the crash. Accordingly, we hold that any error in admitting the photograph was harmless.

3. Blood sample at hospital; blood alcohol level

Overruling Quintana's challenge, the trial court admitted her blood sample "and the results of any tests revealing intoxicants in the blood." CP at 80-81. As with the photograph, we need not address this evidentiary issue because, even if admitting the blood alcohol evidence of Quintana's intoxication was constitutional evidentiary error, any error was harmless. We are convinced beyond a reasonable doubt that there was sufficient other evidence from which any reasonable jury would have concluded that Quintana was under the influence of intoxicating liquor while driving the Blazer or, alternatively, that she was driving the Blazer in a reckless manner, an essential element that the State had to prove for the jury to find her guilty of vehicular assault.

Jury Instruction 9 provided, "A person is under the influence or affected by the use of intoxicating liquor when the person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of intoxicating liquor." CP at 69. In *State v. Morales*, 154 Wn. App. 26, 45, 225 P.3d 311 (2010),[33] we held that the trial court's erroneous admission of blood test evidence

[32] Although Newton testified that he had observed a male driving the Blazer shortly before the accident, Detective Killeen testified that Sergeant Newton would have had an extremely short opportunity to observe the Blazer's driver as the vehicle sped past the annex building where they had been standing.

[33] *Rev'd on other grounds*, No. 84197-7, 2012 WL 243576 (Wash. Jan. 26, 2012).

was harmless in light of the other evidence establishing the driver's intoxication: (1) the driver had run a stop sign and collided with an approaching car, which "strongly suggest[ed] some degree of impairment"; (2) law enforcement officers testified that the driver's appearance had indicated intoxication; (3) the officers had located alcohol containers in the vehicle; and (4) the vehicle had smelled of alcohol. We concluded, "These facts alone would have allowed any reasonable jury to conclude that [the driver] had been driving under the influence of alcohol."[34] *Morales*, 154 Wn. App. at 44-45.

Here, similar to the facts in *Morales*, after the crash, Bidewell smelled intoxicants and Smith observed a half-full bottle of liquor inside the Blazer. And the evidence was undisputed that Quintana had been drinking before the crash. Wahwassuck, the Blazer passenger who suffered injuries in the crash, testified that he and Quintana had been drinking alcohol before the accident and that Quintana had driven the Blazer in reckless manner:

> [W]e were drinking, I'm not gonna lie about that. [Quintana] pul[ed] out and said do you want a ride. And I kind of had feelings whether to go or not, but then I finally went with [Quintana]. [W]e tore out from [a side street] and went over into [a] ditch, and then back out and ran to the other end of the Res[ervation] doing seventy-plus. [W]e done hit the highway, didn't even stop at the stop sign, just jumped right out on the highway, cars coming both ways. [The other vehicles] seen us pulling on the highway and then all they did was pull over to the side both ways. [Quintana] tried to turn [onto another street] and we were doing, like, a hundred and ten, slowed down to about ninety-five, and she hit the brakes to slow down to turn, and we just went straight and hit the telephone pole.

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[34] Our Supreme Court overruled our opinion on the ground that the State did not prove that Morales received notice that he had the right to have any qualified person administer a breathalyzer test in addition to the mandatory test that law enforcement requires Morales to undergo. *Morales*, 2012 WL 243576, at *7. Our opinion concluded that Morales *did* receive notice and, even if he did not, the error was harmless. Our Supreme Court disagreed with us on the first ground, but did not disturb our harmless error holding.

II VRP at 214-16.

Consistent with Wahwassuck's description of Quintana's driving, shortly before the crash, Smith and Newton had observed the Blazer traveling at between 80 to 90 miles per hour. Laur testified that the crash was caused by "[t]he vehicle . . . going too fast for the roadway surfaces to keep the vehicle on the roadway"[35] and opined that the Blazer had been traveling at least 40 miles per hour when it crashed into the telephone pole, despite that it was still daylight and the pavement was dry.

Applying *Morales* here, we are convinced beyond a reasonable doubt that any reasonable jury would have concluded that Quintana's "ability to drive a motor vehicle [wa]s lessened in any appreciable degree as a result of intoxicating liquor." CP at 69 (Jury Instruction 9). Thus, even if the trial court's admitting Quintana's blood sample was erroneous, any error was harmless. Furthermore, we are also convinced beyond a reasonable doubt that any reasonable jury would have concluded that Quintana drove the Blazer in a reckless manner, the alternative means of vehicular assault, which also did not depend on Quintana's blood alcohol level.[36]

4. DNA sample

Unlike the photograph and the blood sample, both of which Quintana challenged below,

[35] II VRP at 198.

[36] Quintana also contends that she received ineffective assistance of counsel who, she asserts, failed to distinguish *Smith*, when the trial court relied on *Smith* in ruling that her blood sample was admissible. Quintana misrepresents the record. Contrary to her assertion, the record shows that her trial counsel attempted to distinguish *Smith* to the trial court during the CrR 3.6 hearing: "Your Honor, *Smith* is a Division I case that is not on all fours." I VRP at 61. We review a claim of ineffective assistance of counsel de novo. *State v. Castro*, 141 Wn. App. 485, 492, 170 P.3d 78 (2007). Quintana's claim is completely unsupportable; therefore, it fails.

she did not object to admission of her DNA sample at trial or argue that the WSP had unlawfully swabbed her cheek to obtain her DNA sample when she went to the WSP offices to retrieve her belongings. Generally, we do not review assignments of error not raised below unless the appellant demonstrates a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

To benefit from this exception, however, Quintana must establish (1) that the error was "'truly of constitutional dimension'"; and (2) that the error was "'manifest.'" *State v. Grimes*, 165 Wn. App. 172, 267 P.3d 454, 461 (2011) (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). For an error to be manifest, Quintana must show that the asserted error "had practical and identifiable consequences at trial." *Grimes*, 267 P.3d at 462 (citing *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)); *see also State v. Bertrand*, ___ Wn. App. ___, 267 P.3d 511, 514 (2011). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The record does not contain sufficient facts surrounding the taking of Quintana's DNA sample for us to consider the merits of this alleged error. The record provides only that Detective George "got the buccal swabs" from Quintana on October 27, 2009, when Quintana, apparently voluntarily, went to the police department to retrieve her personal property that the officers had recovered from the Blazer at the scene of the crash after she was been taken to the hospital. II VRP at 240. Quintana has thus failed to demonstrate a manifest error affecting a constitutional right that might bring her within the exception to RAP 2.5(a)(3), which otherwise requires preservation of an error below to preserve it for appeal. Accordingly, we do not further consider

her argument that her DNA sample was inadmissible.

B. Sufficiency

Quintana next argues that, after excluding the improperly admitted evidence, insufficient admissible evidence remained to prove beyond a reasonable doubt that she had been driving the Blazer when it crashed and that she had been intoxicated or driving recklessly at the time.[37] This argument fails.

1. Standard of review

A claim of insufficiency admits the truth of the State's evidence. *Grimes*, 267 P.3d at 465. In testing the sufficiency of the evidence, we view the facts and inferences drawn from the facts in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Slighte*, 157 Wn. App. 618, 626, 238 P.3d 83 (2010), *modified on remand*, 164 Wn. App. 717, 267 P.3d 401 (2011).

2. Sufficient evidence supported Quintana's conviction

Quintana contends that, without the illegally obtained evidence, insufficient admissible evidence remained to prove beyond a reasonable doubt that she was driving the Blazer when it crashed and that she was intoxicated and/or driving recklessly. We disagree. Even without her blood alcohol level and the photograph of her bruised chest,[38] there was sufficient admissible evidence for a rational jury to find beyond a reasonable doubt that Quintana was driving the

[37] Quintana does not challenge the "substantial bodily harm to another" element of vehicular assault. RCW 46.61.522. Furthermore, the evidence was uncontroverted that Wahwassuck suffered substantial bodily injury, a broken leg.

[38] As we have already explained, admission of the photograph and her blood alcohol level was harmless, if error; and we do not address for the first time on appeal Quintana's challenge to the admissibility of her DNA sample because she failed to object at trial.

vehicle (1) at the time of the crash and (2) either while under the influence of intoxicating liquor or, alternatively, in a reckless manner.

Viewing the facts and inferences drawn from the facts in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Quintana was driving the Blazer at the time of the crash, based on the following evidence: (1) Back seat passenger Wahwassuck testified unequivocally that Quintana was driving the Blazer at the time of the crash; and (2) forensic scientist O'Neill testified that the DNA in the blood from the Blazer's steering wheel matched Quintana's DNA profile (from her cheek swab), that tissue from the passenger's side windshield matched Obi's DNA profile, and it would have been physically impossible for the person sitting in the driver's seat to have impacted the passenger side windshield.

There was also sufficient evidence for any rational trier of fact to have found beyond a reasonable doubt that Quintana was driving the Blazer either while under the influence of intoxicating liquor or, as an alternative means, in a reckless manner. In *State v. Randhawa*, 133 Wn.2d 67, 74-75, 941 P.2d 661 (1997), our Supreme Court held that the following evidence was sufficient to establish both alternative means of vehicular homicide (driving under the influence of intoxicating liquor and reckless driving):[39] (1) WSP troopers had noticed the odor of intoxicants on Randhawa; (2) witnesses testified that Randhawa had been drinking before the accident; (3) eyewitness and expert testimony "supported a conclusion that Randhawa had been speeding and

[39] Vehicular homicide and vehicular assault share the same elements, except that the former requires "the death of any person" and the latter requires "substantial bodily harm." *Compare* RCW 46.61.520 *with* RCW 46.61.522.

that he veered out of his own lane of travel just before the accident occurred"; and (4) there was evidence that Randhawa had "failed to negotiate a sweeping curve" despite the good weather conditions and the reduce-speed sign.

Applying *Randhawa* here, we hold that there was similarly sufficient clearly admissible evidence for a rational jury to find that Quintana drove the Blazer either while under the influence of intoxicating liquor or, alternatively, in a reckless manner. As we have previously explained, the following evidence supports that Quintana had been driving under the influence of intoxicating liquor: (1) Bidewell smelled intoxicants in the Blazer; (2) Smith observed a half-full bottle inside the vehicle; and (3) Wahwassuck, the backseat passenger, testified that he and Quintana had been drinking alcohol before the accident. And the following evidence supports that Quintana had been driving in a reckless manner: (1) Wahwassuck testified that Quintana ran stop signs, drove suddenly onto a busy highway, caused vehicles to pull off the highway to avoid a collision, and reached speeds over 100 miles per hour before crashing into the pole; (2) Smith and Newton testified that they observed the Blazer travelling at between 80 to 90 miles per hour; and (3) Laur testified that the accident was caused by "[t]he vehicle . . . going too fast for the roadway surfaces to keep the vehicle on the roadway." II VRP at 198.

We hold, therefore, that viewed in the light most favorable to the State, the evidence was sufficient for a rational trier of fact to have found beyond a reasonable doubt that Quintana was driving the Blazer recklessly and/or under the influence of alcohol at the time of the accident.

III. Unanimity Instruction

Quintana argues that the trial court erred in failing sua sponte to instruct the jury that it must unanimously agree on which means of vehicular assault Quintana committed.[40] Quintana did not preserve this error for review because she neither requested such an instruction nor objected below to the trial court's failure to give a unanimity instruction. Accordingly, we need not address this issue; but, even addressing it, Quintana's argument fails.

We review for constitutional harmless error a trial court's alleged failure to give a unanimity instruction. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). As our Supreme Court announced in *Randhawa*, 133 Wn.2d at 73-74:

> Where . . . a defendant is charged with alternative means of committing vehicular homicide,[41] jury unanimity is not required as to which alternative the defendant is guilty of, provided the State presented sufficient evidence supporting each of the alternative means. If there is sufficient evidence to support each alternative means submitted to the jury, the conviction will be affirmed because we infer that the jury rested its decision on a unanimous finding as to the means.

(internal citations omitted). As we explain above, the evidence was sufficient to support both vehicular assault alternatives. Accordingly, we hold that the absence of a unanimity instruction on the alternative means was not error.

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[40] Quintana asserts that the State "charged Quintana with all three alternative means of committing vehicular assault." Br. of Appellant at 41. Quintana misreads the jury instructions; the trial court instructed the jury on only two alternative means of committing vehicular assault: (1) driving a vehicle in a reckless manner, or (2) being under the influence of intoxicating liquor.

[41] As we note above, vehicular homicide and vehicular assault share the same alternative means for committing these crimes. *Compare* RCW 46.61.520 *with* RCW 46.61.522.

IV. Statement of Additional Grounds

In her SAG, Quintana argues that the State "impeached [its] own witnesses" because Newton testified that he observed a male driving the Blazer shortly before the crash.[42] SAG at 1. Quintana also argues that her trial counsel "neglected his services to his client" because he failed to hire a private investigator and "[h]e also only allowed 5 to 10 minutes for [Quintana] to talk with him." SAG at 1. Even if the State impeached its own witness, Quintana does not explain how this was an error. And Quintana's disagreements with her trial counsel's conduct do not constitute ineffective assistance of counsel, and, in any event, we refuse to consider this issue because it involves matters outside the record. *McFarland*, 127 Wn.2d at 335.

We affirm.

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.

Hunt, J.

I concur:

Johanson, J.

[42] Quintana wrongly asserts that Smith testified that she was the passenger. *See* SAG at 1. Smith did not observe either the driver or the passenger.

Armstrong, J. (dissenting) — Because the unlawfully seized evidence that the State used to prove Quintana's blood alcohol level was not harmless error, I dissent.

I. Unanimity

The State charged Barbara Quintana with vehicular assault under RCW 46.61.522, which requires the State to prove that Quintana (1) operated the vehicle recklessly or (2) was under the influence of intoxicating liquor or any drug. Because the State charged both alternative means, and the trial court did not instruct the jury that it had to be unanimous, substantial evidence must support both that Quintana drove in a reckless manner *and* that she was under the influence of intoxicating liquor. Wash. Const. art. I, § 21; RCW 46.61.522(1)(a), (b).

The trial court relied on *State v. Smith*, 84 Wn. App. 813, 929 P.2d 1191 (1997), to admit Quintana's blood draw, which the State used to prove she was under the influence of intoxicating liquor. In *Smith*, the investigating officers had probable cause to arrest Smith at the scene but they did not arrest him because he claimed another person had been driving. Thus, the implied consent statute did not apply. *Smith*, 84 Wn. App. at 818-19. Nonetheless, Division I of this court held that Smith's medical blood draw was admissible because of (1) the policy behind the implied consent law; (2) Smith's medical records were not protected by the medical privilege statute; (3) Smith waived his medical privilege by testifying in detail about his drinking; and (4) only Smith's lie about who was driving prevented the police from obtaining a legal blood draw. *Smith*, 84 Wn. App. at 819-23.

Smith is distinguishable from the facts here. First, the officers did not have probable cause to arrest Quintana at the scene and she said nothing to mislead them. Second, the blood draw

here was not a medical blood draw; the State obtained it because an investigating officer asked for it; and the State presented no evidence of a medical blood draw. Third, the trial court suppressed all of Quintana's medical record evidence because she was incapable of giving valid consent, a decision the State has not appealed. Fourth, Quintana did not testify about her drinking. In short, Quintana's medical blood draw was not legal and the trial court erred in allowing evidence of her alcohol level as shown by the blood draw.

II. Harmless Error

Nonetheless, the majority reasons that the trial court's admission of Quintana's alcohol test results was harmless error because the State submitted sufficient evidence from which a reasonable jury could have found Quintana was under the influence of an intoxicant. I disagree.

The majority relies on *State v. Randhawa*, 133 Wn.2d 67, 941 P.2d 661 (1997) and *State v. Morales*, 154 Wn. App. 26, 225 P.3d 311 (2010), *affirmed in part, reversed in part*, 173 Wn.2d 560 (2012), to support its harmless error analysis. Majority at 20-21, 24-25. Both cases are distinguishable. In *Randhawa*, the State presented evidence that the defendant was speeding, veered into the oncoming lane of travel just before losing control of the vehicle, smelled of alcohol while in the ambulance, and testified he had been drinking. *Randhawa*, 133 Wn.2d at 72-74. In *Morales*, the officers testified the defendant smelled of alcohol and had bloodshot eyes with constricted pupils; they also found two open beers in the vehicle in which defendant was the sole occupant. *Morales*, 154 Wn. App. at 45.

Here, Officer Aaron Bidewell smelled intoxicants in the Blazer but David Wahwassuck testified that he, not Quintana, had been drinking from the half-full bottle found in the Blazer.

And although Wahwassuck testified he had been drinking with Quintana, he did not testify to how much she had been drinking.

Because the unlawfully seized evidence that the State used to prove Quintana's blood alcohol level was not harmless error, I dissent. I would reverse and remand for a new trial.

_____
Armstrong, J.