REL: March 12, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0307

Jorge Ruiz

v.

State of Alabama

Appeal from Autauga Circuit Court
(CC-19-173)

PER CURIAM.

Jorge Ruiz appeals his conviction for reckless murder, see § 13A-6-2(a)(2), Ala. Code 1975; driving without a license, see § 32-6-1, Ala. Code

1975; and being a minor in possession of alcohol, see §§ 28-1-5 and 28-3A-25(a)(18), Ala. Code 1975. Ruiz was sentenced to 99 years' imprisonment for his reckless-murder conviction and 3 months in jail for his minor-in-possession-of-alcohol conviction, to be served consecutively; was fined for his driving-without-a-license conviction; and was ordered to pay other fines, fees, and restitution.

Facts and Procedural History

Around 9:30 p.m. on October 27, 2018, Ruiz and three of his friends drove to a music festival in Birmingham, where Ruiz, who was under 21 years of age, drank an unknown amount of beer. Ruiz and his friends left the festival around 1:00 a.m. and drove back to the house of one of the friends, where they arrived around 1:30 a.m. Ruiz slept on a couch until he left in his truck around 5:00 a.m. Approximately one hour later, Ruiz was involved in a head-on automobile collision on U.S. Highway 31 near Prattville when his truck crossed the center line of the highway and struck a small automobile driven by Marlena Hayes. Hayes was pronounced dead at the scene of the accident, and Ruiz was taken to a hospital, where he was treated and released. Testing on blood samples

obtained from Ruiz at the hospital approximately four hours after the accident revealed that his blood-alcohol content ("BAC") was .016 percent -- below the .02 percent at which a person under 21 years of age is prohibited from driving a vehicle. See § 32-5A-191(b), Ala. Code 1975.

State Trooper Danny Warr responded to the scene of the accident and spoke with Ruiz, who was in an ambulance by that time. Trooper Warr testified that, "when [he] first stepped into the back of the ambulance, [he] could detect an odor of an alcoholic beverage," and he testified that Ruiz "looked like someone [who] had been up all night" and had "glassy eyes." (R. 193.) After speaking with Ruiz, Trooper Warr began investigating the scene, and during that investigation he observed "a couple" of open beer cans in Ruiz's truck. (R. 195.) Trooper Warr testified that he estimated that Ruiz was traveling approximately 70 miles per hour in an area where the speed limit was 55 miles per hour. The expert witness who examined the event data recorder ("EDR") on Ruiz's truck calculated that Ruiz's speed five seconds before the accident was 74.7 miles per hour, and the EDR indicated that Ruiz's truck did not swerve or turn sharply in the five seconds preceding the accident and that

Ruiz "never got on the brakes" in the five seconds preceding the accident.[1] (R. 287.) There was no testimony as to the manner in which Ruiz's truck was operating more than five seconds before the accident, apparently because, according to the EDR expert, "most cars have five seconds of precrash data, which is constantly buffered." (R. 282.)

Ruiz did not testify at trial, but the State played a video recording of a statement he made to Trooper Warr following his arrest. During that statement, Ruiz indicated that he did not remember much about the accident but that he did remember losing control of his truck in a curve in the highway, which, he said, caused his truck to enter the opposite lane. However, Ruiz could not remember what caused him to lose control of his truck. Regarding the location of the accident, Trooper Warr testified that the accident occurred just past "the little bit of a curve that [Ruiz] had just came out of." (R. 211.)

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[1]The EDR expert testified that the EDR and the speedometer indicated a speed of 70 miles per hour. However, the expert calculated Ruiz's speed to be 74.7 miles per hour based on the fact that the tires on Ruiz's truck at the time of the accident were a different size than the original tires. Because of the different tire size, the EDR and the speedometer would indicate a speed less than Ruiz's actual speed.

In March 2019, Ruiz was indicted for reckless murder, driving without a license, and being a minor in possession of alcohol. Before trial, Ruiz filed a motion to suppress the statement he made to Trooper Warr following his arrest because, Ruiz said, he did not voluntarily and intelligently waive his Miranda[2] rights. Ruiz also filed a motion to suppress the evidence of his BAC following the accident because, he said, he did not voluntarily and intelligently consent to the drawing and testing of his blood. In support of both motions, Ruiz contended that he "does not speak English and has only a rudimentary understanding of the English language." (C. 52, 57.) On June 26, 2019, the trial court entered an order appointing a Spanish language interpreter for Ruiz.

The trial court held an evidentiary hearing on Ruiz's motions to suppress and subsequently denied both motions after finding that Ruiz knowingly consent to the drawing of his blood and knowingly waived his Miranda rights before making a statement to Trooper Warr. (C. 89, 90.) That same day, the trial court also denied Ruiz's motion for funds to hire

[2]Miranda v. Arizona, 384 U.S. 436 (1966).

an expert to examine the EDR on Ruiz's truck because the motion had been filed four business days before the trial was scheduled to begin.

Ruiz's trial began on July 22, 2019. At the close of evidence, Ruiz moved for a judgment of acquittal, but the trial court denied the motion and submitted the reckless-murder charge and the two nonfelony charges to the jury. The trial court also instructed the jury on reckless manslaughter, see § 13A-6-3(a)(1), Ala. Code 1975, and criminally negligent homicide, see § 13A-6-4, Ala. Code 1975, as lesser-included offenses of reckless murder. As noted, the jury returned guilty verdicts on reckless murder and the two nonfelony charges, and on August 14, 2019, the trial court sentenced Ruiz.

On September 11, 2019, the trial court removed Ruiz's trial counsel, citing several perceived problems with counsel's representation, and appointed new counsel to review the case. On September 13, 2019, Ruiz filed a motion for a new trial or, in the alternative, for a judgment of acquittal in which he (1) argued that the evidence was insufficient to support his reckless-murder conviction, (2) argued that the trial court erred in denying his motion to suppress evidence of his BAC following the

accident, and (3) raised several ineffective-assistance-of-counsel claims. The motion was denied by operation of law. On December 30, 2019, Ruiz was granted an out-of-time appeal.

Analysis

On appeal, Ruiz argues (1) that the evidence was insufficient to support his reckless-murder conviction, (2) that the trial court erred in denying his motion to suppress the statement he made to Trooper Warr following his arrest, (3) that the trial court erred in denying his motion to suppress evidence of his BAC following the accident, and (4) that his trial counsel rendered ineffective assistance of counsel.

I. Sufficiency of the Evidence to Sustain Reckless-Murder Conviction

Ruiz argues that the evidence was insufficient to sustain his reckless-murder conviction.

> "The role of this Court when reviewing a challenge to the sufficiency of the evidence is well settled:
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> > " ' " 'In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution.' " Ballenger v. State,

720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985). " 'The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt.' " Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). " 'When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision.' " Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). "The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury." Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).

> " ' "The trial court's denial of a motion for judgment of acquittal must be reviewed by determining whether there was legal evidence before the jury at the time the motion was made from which the jury by fair inference could find the defendant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, this court will determine only if legal evidence was presented from which the

> jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983). When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for judgment of acquittal does not constitute error. McConnell v. State, 429 So. 2d 662 (Ala. Cr. App. 1983)." '

"Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003), cert. denied, 891 So. 2d 998 (Ala. 2004) (quoting Ward v. State, 610 So. 2d 1190, 1191 (Ala. Crim. App. 1992))."

Collier v. State, 293 So. 3d 961, 966 (Ala. Crim. App. 2019).

Section 13A-6-2(a)(2), Ala. Code 1975, provides:

> "A person commits the crime of murder if he or she does any of the following: ... Under circumstances manifesting extreme indifference to human life, he or she recklessly engages in conduct which creates a grave risk of death to a person other than himself or herself, and thereby causes the death of another person."

Section 13A-2-2(3), Ala. Code 1975, provides:

> "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation

> from the standard of conduct that a reasonable person would observe in the situation. A person who creates a risk but is unaware thereof solely by reason of voluntary intoxication, as defined in subdivision (e)(2) of Section 13A-3-2, acts recklessly with respect thereto."

Section 13A-3-2(e)(2), Ala. Code 1975, provides:

> " 'Voluntary intoxication' means intoxication caused by substances that the actor knowingly introduced into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them under circumstances that would afford a defense to a charge of crime."

In Allen v. State, 611 So. 2d 1188 (Ala. Crim. App. 1992), this Court considered a challenge to the sufficiency of the evidence in a case where the appellant, Alonza James Allen, was convicted of reckless murder following an automobile accident in which the car he was driving crossed the center line of a two-lane highway and struck another car, which resulted in the death of Jeannie Griffin, who was a passenger in that other car. At trial, Allen testified that the accident occurred because "he had been forced to move to the right in order to avoid a collision with [an oncoming tractor-trailer] truck" and that, "in his attempt to avoid the oncoming truck both of the tires on the right side of his vehicle went onto the shoulder, which was lower than the surface of the highway." Allen,

611 So. 2d at 1189. According to Allen, "when he attempted to return to the highway after the truck had passed by, 'the right front tire ... got caught on the side, on the drop-off on the road' and ... he 'snatched [the steering wheel] back' and 'it kind of throwed the car at a 45 degree angle.' " Id. However, an eyewitness to the accident testified that "there was no tractor-trailer truck that ran [Allen] off the road" and testified that Allen's car did not leave the highway before the accident but, instead, "swerved across the center line, went back in his own lane, then veered across the center line and struck [Griffin's] car." Id. The state trooper who investigated the accident testified that Allen appeared intoxicated at the scene -- including "a strong odor of alcoholic beverage about his person" and "glassy, bloodshot eyes" -- and a "breath test revealed that the appellant's blood alcohol content was .163%." Id.

In considering whether there was sufficient evidence to sustain Allen's reckless-murder conviction, this Court stated:

> "[Allen] was charged with the form of murder generally referred to as either 'reckless,' 'universal malice' or 'depraved heart' murder. This form of murder is defined in Ala. Code 1975, § 13A-6-2(a)(2): 'A person commits the crime of murder if ... [u]nder circumstances manifesting extreme indifference

to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person.' One of the elements the prosecution must prove under the clear language of § 13A-6-2(a)(2) is 'conduct which manifests an extreme indifference to human life.' King v. State, 505 So. 2d 403, 407 (Ala. Cr. App. 1987). The appellant asserts that the prosecution failed to prove 'that he acted with "extreme indifference to human life." ' We disagree.

"This Court has, on several occasions, addressed the question of the sufficiency of the evidence in the context of a prosecution for reckless murder involving a defendant who was driving while intoxicated. See, e.g., Davis v. State, 593 So. 2d 145, 148 (Ala. Cr. App. 1991); Patterson v. State, 518 So. 2d 809, 815-16 (Ala. Cr. App. 1987); Smith v. State, 460 So. 2d 343, 346 (Ala. Cr. App. 1984); Slaughter v. State, 424 So. 2d 1365, 1367 (Ala. Cr. App. 1982); Jolly v. State, 395 So. 2d 1135, 1137-41 (Ala. Cr. App. 1981). It does not appear that we have previously specifically addressed the element of 'manifesting extreme indifference to human life' in that regard, although we made a brief reference to the matter in Jordan v. State, 486 So. 2d 482, 484 (Ala. Cr. App. 1985), affirmed on other grounds, 486 So. 2d 485 (Ala. 1986). We note that § 13A-6-2(a)(2) 'reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly.' Model Penal Code, Commentaries § 210.2 at 21. Stated another way, the conduct condemned by § 13A-6-2(a)(2) is that which is culpably equivalent to intentional murder. Consequently, while '[w]hat amounts to "extreme indifference" depends on the circumstances of each case, ... some shocking, outrageous, or special heinousness must be shown.' King v. State, 505 So. 2d 403, 407 (Ala. Cr. App. 1987) (emphasis added). For example, § 13A-6-2(a)(2) 'embrace[s] those

homicides caused by ... driving an automobile in a grossly wanton manner.' Northington v. State, 413 So. 2d 1169, 1172 (Ala. Cr. App. 1981), cert. quashed, 413 So. 2d 1172 (Ala. 1982) (emphasis added).

"Section 13A-6-2(a)(2) also requires the State to prove that the defendant engaged in reckless conduct.

> " 'Recklessness, as defined in [§ 13A-2-2(3)] presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where recklessness may be found and where it should be assimilated to purpose or knowledge for purposes of grading. Under [our statutory scheme], this judgment must be made in terms of whether the actor's conscious disregard of the risk, given the circumstances of the case, so far departs from acceptable behaviour that it constitutes a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Ordinary recklessness in this sense is made sufficient for a conviction of manslaughter under [§ 13A-6-3(a)(1)]. In a prosecution for murder, however, [§ 13A-6-2(a)(2)] calls for the further judgment whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provocation or other mitigation apart, purposeful or knowing homicide

> demonstrates precisely such indifference to the value of human life. Whether recklessness is so extreme that it demonstrates similar indifference is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.'

"Model Penal Code, Commentaries § 210.2 at 21-22 (emphasis added and footnotes omitted).

"Where we have previously found the evidence to be sufficient to support a conviction for reckless murder, the defendant was clearly operating his vehicle in a 'grossly wanton manner' or under circumstances exhibiting 'some shocking, outrageous, or special heinousness.' See Davis v. State, 593 So. 2d at 148 (defendant, who had a blood alcohol content of .237% and several convictions for driving under the influence, 'drove through dense fog at speeds of between 75 and 88 miles per hour' and 'hit the victims' vehicle head-on in their lane of traffic'); Patterson v. State, 518 So. 2d at 810-11, 816 (defendant, who had a blood alcohol content of .3%, a previous arrest for driving under the influence, and had previously undergone alcoholic treatment, was driving at a speed of between 50 and 70 miles per hour when his vehicle crossed the median, without appearing to brake, and struck the victim's car); Smith v. State, 460 So. 2d at 345 (defendant, who had a blood alcohol content of .25%, 'collided head-on' with the victims' vehicle); Slaughter v. State, 424 So. 2d at 1366-67 (defendant, who had a blood alcohol content of between .16% and .19% and at least four prior arrests for driving under the influence, was speeding, ' "fishtailing and ricocheting back and

forth from one side to the other," ' and 'traveling "like [his car] was out of control," ' prior to crossing the oncoming lane of traffic, 'jump[ing] the curb and str[iking] the victim as she was working in her front yard'); Jolly v. State, 395 So. 2d at 1137-38 (defendant was driving fast and ' "wobbling" ' on the road, then drove 'off the road and traveled through the front of several yards' before colliding with the vehicle in which the victim was a passenger). See also Pears v. State, 672 P.2d 903, 909 (Alaska App. 1983) (evidence sufficient to support conviction for reckless murder where defendant voluntarily drank to point of intoxication, then 'drove recklessly, speeding, running through stop signs and stop lights and failing to slow for yield signs,' and continued to drive in this manner after his passenger told him that he was scaring her and after being stopped by two uniformed police officers who instructed him 'not to drive because he was too intoxicated'), remanded on other grounds, 698 P.2d 1198 (Alaska 1985); Walden v. Commonwealth, 805 S.W.2d 102, 103, 105 (Ky. 1991) (evidence that defendant, who had a blood alcohol content of .297%, was driving at a high rate of speed on a two-lane country road, 'dropped a wheel off the pavement, lost control, crossed the center line,' and struck another vehicle was sufficient to support his conviction for reckless murder). Cf. People v. Moquin, 142 A.D.2d 347, 536 N.Y.S.2d 561, 565-66 (1988) (evidence that defendant drove her vehicle 'while highly intoxicated and at an excessive rate of speed in the lane for oncoming traffic,' and that she failed to avoid an oncoming vehicle 'despite the opportunity to do so constitute[d] legally sufficient evidence' to preclude the dismissal of a charge of reckless murder) .... We note that the underlying facts were similar in nature in cases where sufficiency of the evidence was not at issue on appeal. See, e.g., Robinson v. State, 584 So. 2d 533, 535-36 (Ala. Cr. App.) (defendant, who had a blood alcohol content of .193%, was speeding, crowding the right-hand lane of the interstate, and driving 'in the middle of

the road,' before he 'suddenly veered left, careened into a ditch in the median, and "somersaulted" into the oncoming ... traffic,' where he collided with the victims' vehicle), cert. quashed, 584 So. 2d 542 (Ala.1991).

"In Jordan v. State, 486 So. 2d 482 (Ala. Cr. App. 1985), affirmed, 486 So. 2d 485 (Ala. 1986), the defendant was convicted of reckless murder under § 13A-6-2(a)(2). The evidence showed that the defendant arrived at a friend's house in an intoxicated condition, consumed two beers, then drove with his friend to a package store some two miles distant. The defendant drove to the store 'in a reckless manner, occasionally swerving completely into the oncoming lane of traffic on the two-lane road,' 'running off the road,' and 'forc[ing] two oncoming cars from the road by driving in the oncoming traffic lane.' Jordan v. State, 486 So. 2d at 483. The defendant purchased a bottle of tequila at the package store. He drank from this bottle during the drive back to his friend's house and continued to drive in a reckless fashion. At one point when the defendant was driving 'in the wrong lane,' his friend 'took the steering wheel and eased the [vehicle] back into the proper lane. While looking angrily at [his friend, the defendant] jerked the steering wheel back, causing the [vehicle] to re-enter the other lane of traffic' where it collided with a vehicle driven by John Odom, killing Odom. Ex parte Jordan, 486 So. 2d 485, 486 (Ala. 1986).

"The State presented evidence that the defendant's blood alcohol content was .14%. Jordan v. State, 486 So. 2d at 483. In addressing the defendant's contention that this evidence should not have been admitted, we observed:

> " ' "It is well settled under our decisions that where the accused is himself the driver of an automobile and drives it in

> a manner greatly dangerous to the lives of others so as to evidence a depraved mind regardless of human life, he may be guilty of [reckless murder] if his anti-social acts result in the death of another, and this though he had no preconceived purpose to deprive any particular human being of life ...."
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> " 'In the present case had the [defendant] been completely sober, his actions before the collision would have evidenced a depraved mind functioning without regard for human life. The fact that a defendant had been drinking before an accident is just one further circumstance to prove that he possessed an extreme indifference to human life.'

"Jordan v. State, 486 So. 2d at 484 (quoting Berness v. State, 38 Ala. App. 1, 83 So. 2d 607 (1953), affirmed, 263 Ala. 641, 83 So. 2d 613 (1955).

" 'Depending on the situation, drunk driving may be ... a circumstance' that a jury could find to 'manifest[ ] extreme indifference to human life.' Walden v. Commonwealth, 805 S.W.2d 102, 105 (Ky. 1991). Jordan and the other cases cited above demonstrate that the 'situation' that will support a conviction for reckless murder must involve something more than simply driving after having consumed alcohol and becoming involved in a collision. As noted above, § 13A-6-2(a)(2) contemplates conduct that is the culpable equivalent of intentional murder.

" 'In determining the sufficiency of the evidence to sustain the conviction, this Court must accept as true the

evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider the evidence in the light most favorable to the prosecution.' Faircloth v. State, 471 So. 2d 485, 489 (Ala. Cr. App. 1984), affirmed, 471 So. 2d 493 (Ala. 1985). In the present case, the jury could have found, from the testimony of the State's witnesses, that the appellant was driving his vehicle in a reckless manner by weaving in his own lane; by swerving into the oncoming lane; by running off the surface of the road onto a low shoulder and attempting to return in an unsafe manner; or by engaging in a combination of any of the three. The prosecution also presented evidence from which the jury could have found that the appellant was legally intoxicated while driving his car in a reckless manner. Although it is a close question, we find that there was sufficient evidence from which the jury could have concluded that the appellant's overall conduct was so grossly wanton that it manifested an extreme indifference to human life. We note that the trial court instructed the jury on the lesser included offenses of manslaughter, vehicular homicide, and criminally negligent homicide. It was within the province of the jury, not this Court, to determine the culpability level of the appellant.

"We note that the evidence in the instant case parallels, to some extent, the evidence in Walden v. Commonwealth. In Walden, the defendant 'dropped a wheel off the pavement, lost control, crossed the center line,' and struck the victim's vehicle. 805 S.W.2d at 103. The defendant in Walden was also speeding. Further, he had a blood alcohol level of .297%, which an expert witness testified 'was not far short of the 0.3% reading at which the average person would normally pass out.' The expert also testified that 'this level of intoxication would delay reaction time and cause disorientation, confusion, a problem with depth perception and balance, and affect one's judgment.' Id. The Kentucky Supreme Court held that 'the extreme nature of the [defendant's] intoxication was sufficient

evidence from which a jury could infer wantonness so extreme as to manifest extreme indifference to human life.' Id. at 105. Although there was no evidence in this case that the appellant was speeding and the appellant's blood alcohol content was somewhat lower than Walden's, we are unwilling to say that those differences, as a matter of law, render the evidence in this case insufficient to support the appellant's conviction.

"We are aware of two Alabama cases in which the defendants' convictions for reckless murder were overturned on the grounds of insufficiency of the evidence. However, we do not find either of those cases to be persuasive here. In Langford v. State, 354 So. 2d 313, 314 (Ala. 1977), the defendant's conviction for reckless murder was reversed even though he had a blood alcohol level of .25%, he had been 'traveling in excess of 90 miles per hour immediately proceeding the collision,' 'struck a mileage marker on the right side of a four-lane highway,' 'swerved to the left and crossed the median,' then collided with the victim's vehicle, 'which was traveling in the opposite direction.' Langford, however, involved a prosecution under Tit. 14, § 314, Ala. Code (Recomp. 1958),[1] and a majority of the Alabama Supreme Court was apparently concerned that there had not, prior to Langford's conviction, been a conviction for first degree murder arising out of a driving under the influence situation. Two dissenting justices were strongly of the opinion that the evidence was clearly sufficient to create a jury question. 354 So. 2d at 316-17 (Maddox, J., dissenting, joined by Beatty, J.). We also note that Langford was decided in 1977, long before the extensive public awareness programs targeting the dangers of driving while intoxicated.

"In Watson v. State, 504 So. 2d 339 (Ala. Cr. App. 1986), this Court reversed the defendant's conviction for reckless murder under § 13A-6-2(a)(2), even though the defendant was

> driving while under the influence of prescribed medication, was speeding, and was passing a bus in a no-passing zone when she struck and killed a child pedestrian. Watson appears to have relied predominantly on Langford and has been previously criticized by this Court. See Weaver v. State, 591 So. 2d 535, 543-45 (Ala. Cr. App. 1991).
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> "The death of Jeannie Griffin was tragic and senseless. For years, the risks and dangers of driving while intoxicated have been well publicized and it is virtually impossible for any reasonably intelligent person to be unaware of those risks and dangers. Those who persist in engaging in that type of conduct must accept the risk of being prosecuted for any number of offenses, including reckless murder.
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> "_____
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> "[1]Title 14, § 314, defined first degree murder to consist of certain homicides, including those 'perpetuated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life.' "

Allen, 611 So. 2d at 1189-93 (some emphasis added; citation to appellant's brief omitted).

In this case, as in Allen, there was evidence to support a finding that, at the time Ruiz's truck collided with Hayes's car, Ruiz was intoxicated to a degree that rendered him unable to drive the truck safely. Specifically, Trooper Warr testified that he "could detect an odor of an alcoholic beverage" when he spoke to Ruiz at the scene of the accident,

that Ruiz had "glassy eyes"at that time, and that he saw open beer cans in Ruiz's truck. In addition, evidence indicated that Ruiz's BAC was .016 percent approximately four hours after the accident, which was lower than the legal limit for a person of Ruiz's age. § 32-5A-191(b). However, Dr. Curt Harper, the chief toxicologist for the Alabama Department of Forensic Sciences, testified that the "average elimination rate" of alcohol from a person's system is "approximately .015 percent per hour." (R. 334.) Thus, construed in a light most favorable to the State, the evidence tended to indicate that Ruiz's BAC at the time of the accident was approximately .076 percent, which is almost four times the legal limit for a person under 21 years of age, § 32-5A-191(b), and is close to the legal limit of .08 percent that applies to a person over 21 years of age, § 32-5A-191(a)(1), Ala. Code 1975. As Dr. Harper noted in his testimony, "[s]ociety has deemed that .08 percent has a high enough crash risk that all individuals are impaired to the extent they are not able to operate a motor vehicle" (R. 337), and our legislature has determined that such a risk exists at a lesser degree of intoxication -- .02 percent, § 32-5A-191(b) -- for a person under the age of 21 years. Jolly v. State, 858 So. 2d 305 (Ala. Crim. App. 2002). See also

§ 32-5A-194(b)(3), Ala. Code 1975 (providing that, in any trial "arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol," the person is presumed to be under the influence of alcohol "[i]f there were at that time 0.08 percent or more by weight of alcohol in the person's blood, or greater than .02 percent if the person ... was under the age of 21 years at that time (emphasis added)). Thus, when Trooper Warr's testimony and Dr. Harper's testimony are construed, as they must be, in a light most favorable to the State, the evidence provided a basis upon which the jury could have concluded that, at the time of the accident, Ruiz was intoxicated to a degree that rendered him unable to drive his truck safely.

Of course, as this Court noted in Allen, "the 'situation' that will support a conviction for reckless murder must involve something more than simply driving after having consumed alcohol and becoming involved in a collision." Allen, 611 So. 2d at 1192. Thus, the mere fact that Ruiz was intoxicated at the time of the accident is not sufficient, in and of itself, to sustain his reckless-murder conviction. In Allen, the only fact that

supported Allen's reckless-murder conviction, in addition to the fact that he was intoxicated, was that Allen was driving his car "in a reckless manner by weaving in his own lane; by swerving into the oncoming lane; by running off the surface of the road onto a low shoulder and attempting to return in an unsafe manner; or by engaging in a combination of any of the three." Allen, 611 So. 2d at 1192. In short, then, the only evidence supporting Allen's reckless-murder conviction was that he was intoxicated and that he recklessly allowed his car to enter the victim's lane and collide with her car.

Here, the only evidence tending to explain why Ruiz's truck entered the lane in which Hayes's vehicle was traveling was Ruiz's own statement that he lost control of the truck in a slight curve in the highway. However, the EDR in Ruiz's truck indicated that, in the five seconds preceding the accident, the truck did not swerve or turn sharply and that Ruiz "never got on the brakes." Those facts tend to refute Ruiz's claim that he lost control of his truck, and, to the contrary, tend to establish that Ruiz heedlessly allowed his truck to weave into Hayes's lane and that he recklessly made no effort to avoid the high-speed collision by applying the

brakes or by attempting to return to his own lane. In addition, the evidence indicated that, at the time of the accident, Ruiz was traveling at almost 20 miles per hour over the posted speed limit -- an additional factor supporting a finding of recklessness that was not present in Allen. Thus, even if Ruiz did lose control of his truck, the evidence indicates that he likely did so because he was intoxicated and was speeding while maneuvering a curve in the highway.

In sum, when construed in a light most favorable to the State, the evidence in this case indicated that, at the time of the accident, Ruiz was intoxicated to a level almost four times the legal limit for a person his age, that he allowed his truck to weave into the lane in which Hayes's vehicle was traveling, that he recklessly made no attempt to avoid the accident after entering Hayes's lane, and that he was traveling almost 20 miles per hour over the posted speed limit. Based on this Court's holding in Allen, we conclude that such evidence was sufficient to support a finding of "circumstances manifesting extreme indifference to human life." § 13A-6-2(a)(2). See Allen, 611 So. 2d at 1192 (noting that " 'drunk driving may be ... a circumstance' that a jury could find to 'manifest[ ] extreme

indifference to human life,' " provided that there is "something more than simply driving after having consumed alcohol and becoming involved in a collision" (quoting Walden, 805 S.W.2d at 105)). Indeed, we find the facts of this case to be similar to the facts in Allen, with the added factor that Ruiz was traveling almost 20 miles per hour over the posted speed limit. See Tims v. State, 711 So. 2d 1118, 1121 (Ala. Crim. App. 1997) (holding that there was sufficient evidence to sustain the defendant's reckless-murder conviction because the evidence "tended to show that, at the time of the collision, the appellant was intoxicated and was operating his vehicle heedlessly and erratically and at an excessive speed"). Thus, it was for the jury, which was given the option of convicting Ruiz of a lesser offense than reckless murder, to consider the evidence and "to determine the culpability level of [Ruiz]." Allen, 611 So. 2d at 1193. Accordingly, the trial court did not err in denying Ruiz's motion for a judgment of acquittal on his reckless-murder charge.[3] In reaching this

[3]Because we hold that the evidence was sufficient to sustain Ruiz's reckless-murder conviction, we pretermit discussion of Ruiz's argument that the evidence was not sufficient to sustain a conviction for either reckless manslaughter or criminally negligent homicide.

conclusion, it bears repeating the Court's warning in Allen to those who choose to drive while intoxicated:

> "For years, the risks and dangers of driving while intoxicated have been well publicized and it is virtually impossible for any reasonably intelligent person to be unaware of those risks and dangers. Those who persist in engaging in that type of conduct must accept the risk of being prosecuted for any number of offenses, including reckless murder."

611 So. 2d at 193.

Before turning to Ruiz's other claims, we acknowledge Ruiz's reliance on Langford v. State, 354 So. 2d 313 (Ala. 1977), and Watson v. State, 504 So. 2d 339 (Ala. Crim. App. 1986) -- cases in which the Alabama Supreme Court and this Court, respectively, held that there was insufficient evidence to sustain murder convictions for defendants who killed someone while driving under the influence of alcohol or drugs. Langford involved a prosecution under § 13-1-70, Ala. Code 1975 -- the predecessor to § 13A-6-2 -- which provided, in pertinent part: " 'Every homicide ... perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular

person of life, is murder in the first degree.' " Langford, 354 So. 2d at 315 (quoting § 13-1-70 (emphasis omitted)). The Alabama Supreme Court held that proof of a "depraved mind," § 13-1-70, required evidence indicating that the defendant " 'determine[d] to take life,' " id. (quoting Mitchell v. State, 60 Ala. 26 (1877)), i.e., that the defendant engaged in "some mental operation" that resulted in "the reasoning faculty ... be[ing] called into play." Id. Thus, the Court held, the evidence in Langford was insufficient to sustain the defendant's first-degree-murder conviction because, although the defendant was intoxicated at the time of the accident, the evidence indicated that

> "the defendant determined only to drive upon the highway after drinking. There is no showing that he determined to have a collision; nor is there any evidence that he realized the likelihood of a collision; and the consequent taking of human life, and proceeded in the face of such probabilities."

354 So. 2d at 315. In Watson, this Court relied primarily on Langford in reversing the defendant's conviction for reckless murder under § 13A-6-2(a)(2), similarly holding that, although the defendant was under the influence of a prescription tranquilizer at the time of the accident, there was

> "no evidence that [the defendant] determined to hit the victim; nor is there any evidence that she realized the likelihood of hitting this victim or any other; and the consequent loss of the victim's life; and proceeded in the face of such probabilities. Langford, supra."

Watson, 504 So. 2d at 347. Relying on those cases, Ruiz argues that the evidence in this case is insufficient to sustain his reckless-murder conviction because, he says, the evidence "simply did not support any conclusion beyond a reasonable doubt that [he] determined to take a life or that he purposefully and knowingly acted to take a life." (Ruiz's brief at 24.)

This Court is, of course, bound by Langford to the extent that it is applicable. However, in Weaver v. State, 591 So. 2d 535 (Ala. Crim. App. 1991), cert. denied, 591 So. 2d 535, this Court noted that the analysis in Langford, and by extension the analysis in Watson, had been superseded by statute:

> "Like the Watson court, we recognize that for an accused to be guilty of universal malice murder under [§ 13A-6-2(a)(2)] the killer must have ... knowingly and consciously acted in the face of the very high risk that death would occur. This culpability requirement ... is clear from the definition of 'recklessness,' which is ... as follows:

> " 'A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.'

"§ 13A-2-2(3) (emphasis added).

"However, our present Code provides a crucial departure from the general rule recognized in Watson, an exception that the Watson court apparently did not find applicable to the set of facts before it. The present Code's definition of 'recklessness' provides, 'A person who creates a risk but is unaware thereof solely by reason of voluntary intoxication, as defined in subdivision (e)(2) of section 13A-3-2, acts recklessly with respect thereto.' See also § 13A-3-2(b) (which provides that '[w]hen recklessness establishes an element of an offense and the actor is unaware of a risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense'). Application of this provision is a clear departure from the law governing the crime of universal malice murder under § 13-1-70 and its predecessors ....

" '....'

"In a discussion of whether one who is charged with universal malice murder (or depraved-heart murder, as the commentators phrase it) is guilty of murder if he is not aware of the risk created by his conduct, we note that Alabama, by § 13A-6-2, follows the Model Penal Code in requiring a showing of the accused's subjective state of recklessness. W. LaFave &

A. Scott, Jr., Substantive Criminal Law § 7.4 n.32 (1986). The treatise continues as follows:

> " 'No doubt most depraved-heart murder cases do not require a determination of the issue of whether the defendant actually was aware of the risk entailed by his conduct; his conduct was very risky and he himself was reasonable enough to know it to be so. ...
>
> " '.....
>
> " 'The real difficulty concerns the intoxicated person who conducts himself in a very risky way but, because of his drunkenness, fails to realize it. If his conduct causes death, should he escape murder liability? The person who unconsciously creates risk because he is voluntarily drunk is perhaps morally worse than one who does so because he is sober but mentally deficient. At all events, the cases generally hold that drunkenness does not negative a depraved heart by blotting out consciousness of risk, and the Model Penal Code, which generally requires awareness of the risk for depraved-heart murder (and for recklessness manslaughter), so provides.'

"Id. at p. 205-06 (footnotes omitted).

"The case of Langford v. State, 354 So. 2d 313 (Ala. 1977), is cited (in n.39) by LaFave and Scott as an exception to the majority that holds drunkenness does not negative a depraved heart. However, as we have discussed, those decisions under § 13-1-70 and its predecessors, such as Langford, were governed by the principle that intoxication

> may negate the mental operation required for universal malice murder and ... the applicability of that principle under present statutory law has clearly been rejected by our legislature by its definition of 'recklessness.' Moreover, our present homicide statutes were derived from the Model Penal Code, Ex parte Weems, 463 So. 2d 170, 172 (Ala. 1984); Commentary, § 13A-6-2. Model Penal Code § 2.08(2), like § 13A-3-2(b), provides that if, because of self-induced intoxication, the accused is unaware of the risk, such unawareness is immaterial.
>
> "Accordingly, we adopt the majority view and conclude that, when the evidence establishes voluntary intoxication as defined by § 13A-3-2(e)(2), the prosecution need not establish that the accused's conduct was knowing and conscious in order to present a case of universal malice."

Weaver, 591 So. 2d at 544-46 (some emphasis added; footnotes omitted).

Thus, for the reasons detailed in Weaver, we conclude -- as we did in the factually similar Allen -- that Langford and Watson are not controlling in this case. This is so because, under the plain language of § 13A-2-2(3), which was not applicable in Langford, our legislature has determined that the fact that Ruiz was voluntarily intoxicated did not negate a finding that he was "aware of and consciously disregard[ed] a substantial and unjustifiable risk," § 13A-2-2(3), as required for a conviction under § 13A-6-2(a)(2).

II. Denial of Ruiz's Motions to Suppress

Ruiz argues that the trial court erred in denying his motion to suppress the statement he made following his arrest and in denying his motion to suppress evidence of his BAC following the accident.

> "In reviewing a trial court's ruling on a motion to suppress, we apply the ore tenus standard of review to the court's findings of fact based on disputed evidence. 'When evidence is presented ore tenus to the trial court, the court's findings of fact based on that evidence are presumed to be correct,' Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994) .... 'Questions of law are reviewed de novo.' Alabama Republican Party v. McGinley, 893 So. 2d 337, 342 (Ala. 2004). Likewise, a trial court's application of law to the facts is reviewed de novo, and 'when the trial court improperly applies the law to the facts, no presumption of correctness exists as to the court's judgment.' Ex parte Agee, 669 So. 2d 102, 104 (Ala. 1995)."

Watson v. State, [Ms. CR-18-0377, January 10, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020).

A. Admissibility of Ruiz's Post-Arrest Statement

Ruiz argues that the trial court erred by admitting the statement he made following his arrest because, he says, he did not voluntarily and intelligently waive his Miranda rights before making the statement.

In Eggers v. State, 914 So. 2d 883 (Ala. Crim. App. 2004), this Court explained:

> "The general rule is that a confession or other inculpatory statement is prima facie involuntary and inadmissible and the burden is on the State to prove by a preponderance of the evidence that such a confession or statement is voluntary and admissible. See, e.g., Ex parte Price, 725 So. 2d 1063 (Ala. 1998). To prove voluntariness, the State must establish that the defendant 'made an independent and informed choice of his own free will, that he possessed the capability to do so, and that his will was not overborne by pressures and circumstances swirling around him.' Lewis v. State, 535 So. 2d 228, 235 (Ala. Crim. App. 1988). If the confession or inculpatory statement is the result of custodial interrogation, the State must also prove that the defendant was properly advised of, and that he voluntarily waived, his Miranda rights. See Ex parte Johnson, 620 So. 2d 709 (Ala. 1993), and Waldrop v. State, 859 So. 2d 1138 (Ala. Crim. App. 2000), aff'd, 859 So. 2d 1181 (Ala. 2002)."

914 So. 2d at 898–99. See also Ex parte Singleton, 465 So. 2d 443, 445 (Ala. 1985) ("Before a confession is admissible, the trial judge must be satisfied by a preponderance of the evidence that it was voluntarily made.").

Trooper Warr arrested Ruiz at his house on the day of the accident and took him to the Autauga Metro Jail. (R. 31.) A video recording from Trooper Warr's body camera captured the events at the jail, and the video was played at the suppression hearing. (State's Ex. 81; R. 32.) At the jail, Trooper Warr asked Ruiz's cousin, Sandra Ruiz (hereafter referred to as

"Sandra"), who was 17 years old and a junior in high school (R. 32), to translate for him. After completing the informational part of the standard Miranda consent form and confirming that Ruiz did not read or write in English, Trooper Warr asked Sandra to read the form to Ruiz in Spanish. Sandra then separately read each of the six items aloud in Spanish. After Sandra read each of the first three items of the consent form, Ruiz nodded that he understood, and he initialed the form beside that item. After Sandra read each of the remaining three items, Ruiz initialed the form. After all six items had been read, Ruiz signed the form and indicated that he understood what Sandra had read to him. (C. 196; State's Ex. 80.) At no time did Ruiz indicate that he did not understand what was being translated to him.

Toward the end of the reading of the Miranda warnings, Ruiz's aunt, who was present in the jail lobby along with two other of Ruiz's relatives, interrupted and asked in Spanish if Ruiz needed an attorney. Someone else in the lobby stated "yes." (R. 43.) Trooper Warr told Sandra to tell Ruiz that he was 19 years old and must answer the questions himself (referring to the Miranda questions). After some cross-talk among Sandra

and Ruiz's relatives, Trooper Warr asked Ruiz's relatives, other than Sandra, to go outside, and he completed the interview with Ruiz and Sandra.

After he completed the Miranda warnings and with Sandra as translator, Trooper Warr asked Ruiz whether he would answer some questions. Ruiz agreed, and he answered questions about his activities during the 24 hours before the accident and about his recollection of the accident itself.

At the suppression hearing, the trial court heard testimony from Trooper Warr and Sandra and viewed parts of the video recording of the events at the jail. (State's Ex. 81; R. 32.) The video was played in short increments, and, after each increment was played, a certified interpreter translated the Spanish language portions of the video into English. The record reflects the following:[4]

> "[Interpreter]: [translating what Sandra read to Ruiz in Spanish] 'And then he is a State Trooper for Alabama, that he or she.'

[4]References to "video playing" and nonsubstantive comments by the trial court (such as "okay") are omitted.

"[Interpreter]:]And that they want to be able to ask the question that you have the right --'

"[Interpreter]: '-- to be in silence so that you can't --'

"[Interpreter]: 'That you don't have to say anything -- you don't have to say nothing or answer --'

"[Interpreter]: '-- the questions.'

"[Interpreter]: 'And again do you understand?'

"[Interpreter]: 'Do you understand Number 1?'

"[Interpreter]: 'The right to be under silence.'

"[Interpreter]: 'To answer some questions.'

"....

"[Interpreter]: 'I have the right to have an attorney with me so he can notify me before any questions.'

"[Interpreter]: Your Honor, it's not the legal -- the legal wording. It has a -- the registry has been lowered apparently in the translation.[5] That's what I'm hearing right now. For example, instead of to pay a lawyer, one will be provided,

---

[5]The interpreter explained that the phrase "the registry has been lowered" means "that it has been simplified. Instead of using the legal terms, they have used other terms to lower -- maybe to make it make sense or the person that is interpreting is not familiar with the terms to be able to interpret them as they are written on the document." (R. 42.)

> instead of provided, you will be able to borrow one, I think, is the word used instead of provided.
>
> "....
>
> "[Interpreter]: 'If I decide to answer questions now without an attorney present, I can stop the questions when I want to.'
>
> "[Interpreter]: 'And I have the right to stop the questions until I have an attorney I can talk to.'
>
> "[Interpreter]: 'I have the rights that were explained and I say that' -- I hear an English word, Your Honor, 'do.'
>
> "....
>
> "[Interpreter]: 'I say that I have not been threatened and to show my decision I am signing my name underneath of the form.' "

(R. 36-42.)

The State introduced the Miranda form, which was signed and initialed by Ruiz, indicating that he understood his rights. (C. 196; State's Ex. 80; R. 53.) Trooper Warr also testified:

> "[Prosecutor]: When you were going over the forms with Mr. Ruiz, when you went number by number, what was the purpose of that?

> "A. I just wanted to make sure, you know, he understood. We do it -- I guess they break it up like that so you don't spit out a whole lot of words at one time so you can --
>
> "[Prosecutor]: You wanted to make sure he understood; is that correct?
>
> "A. -- better understand what was being said."

(R. 56.)

Sandra also testified at the suppression hearing. After watching a portion of the video recording, she testified that she was saying on the video (in Spanish) "that he's [Ruiz] understanding everything that it's saying in the document and that if he doesn't want to answer any questions he doesn't have to because he has the right to remain silent." (R. 63.) The trial court then asked the certified interpreter if that was what Sandra said, and the interpreter responded: "Your Honor, she uses a word 'ensenando' and I think she may be mistaken -- may be thinking that that's a word for signing .... Ensenando means teaching." (Id.)

Ruiz's counsel asked Sandra: "Did [Ruiz] ever verbally acknowledge to you that he understood what he was signing?" (R. 64.) Sandra responded: "Huh-uh, he was just nodding his head." (Id.) The trial court

then asked: "Was he nodding his head yes or no?" (Id.) Sandra answered: "Yes." (Id.)

On appeal, Ruiz does not make an adequate argument as to how his waiver of Miranda rights was not voluntary and intelligent, but he cites Moran v. Burbine, 475 U.S. 412, 421 (1986), for the generalized proposition that a waiver of Miranda rights is valid only if "the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension." (Ruiz's brief at 27 (quoting Moran, supra).

As to coercion, Ruiz argues, without citation to authority, that he was coerced when Trooper Warr told him that he had to answer the questions himself and then asked his relatives to go outside. This argument fails because Trooper Warr's comment referred to questions about the Miranda waiver and because the trial court stated at the hearing that the questions and comments about needing an attorney were directed toward Ruiz's aunt and other relatives. (R. 43-46.) On appeal, Ruiz does not sufficiently explain how the foregoing finding was erroneous, nor does he explain how it constituted coercion for Trooper

Warr to send the relatives away so the consent form could be completed or to require Ruiz to give his own answers to the questions on the consent form.

Further, after the relatives left the room, Ruiz was again told that he did not have to talk to Trooper Warr and that by signing the form he was not agreeing to answer any question but, instead, was indicating only that he understood his rights. Ruiz then initialed and signed the form and apparently acknowledged that he understood his rights. After he completed the Miranda warnings, Trooper Warr again asked Ruiz if he was willing to answer questions. The trial court viewed the video, heard testimony, and determined that Ruiz had voluntarily waived his rights. Ruiz does not demonstrate reversible error in that regard.

As to Ruiz's understanding of his rights, in Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011), this Court stated:

> "The United States Court of Appeals for the Tenth Circuit, when addressing the validity of a foreign-speaking defendant's waiver of his Miranda rights, has stated:
>
> > " 'To determine whether a suspect's waiver of his Miranda rights was intelligent, we inquire whether the defendant knew that he did not have

> to speak to police and understood that statements provided to police could be used against him. United States v. Yunis, 859 F.2d 953, 964-65 (D.C. Cir. 1988). A suspect need not, however, understand the tactical advantage of remaining silent in order to effectuate a valid waiver. Id. at 965. Although language barriers may inhibit a suspect's ability to knowingly and intelligently waive his Miranda rights, when a defendant is advised of his rights in his native tongue and claims to understand such rights, a valid waiver may be effectuated. See United States v. Boon San Chong, 829 F.2d 1572, 1574 (11th Cir. 1987). The translation of a suspect's Miranda rights need not be a perfect one, so long as the defendant understands that he does not need to speak to police and that any statement he makes may be used against him. See, e.g., Yunis, 859 F.2d at 959 (grammatical errors in translated Miranda warning did not render warning constitutionally insufficient); Perri v. Director, Dep't of Corrections, 817 F.2d 448, 452-53 (7th Cir.) (Miranda warning administered in Italian by police officer with no formal training in Italian in dialect different from defendant's sufficient to effectuate valid waiver), cert. denied, 484 U.S. 843, 108 S. Ct. 135, 98 L. Ed. 2d 92 (1987); United States v. Gonzales, 749 F.2d 1329, 1335 (9th Cir. 1984) (waiver valid where defendant appeared to understand Miranda warning administered by officer in broken Spanish).'

"United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990).

"In State v. Ortez, 178 N.C. App. 236, 631 S.E.2d 188 (2006), the Court of Appeals of North Carolina considered the adequacy of Miranda warnings given to a Spanish-speaking defendant and stated:

> " '[D]efendant claims that the Spanish translation of the Miranda rights read to him did not properly convey the right of an indigent defendant to have counsel appointed before questioning. Although the Spanish translation of Miranda warnings used by the Raleigh Police Department in this case contained grammatical errors, we do not find these errors rendered defendant's Miranda warnings inadequate. The United States Supreme Court has never required Miranda warnings to "be given in the exact form described in that decision." Duckworth v. Eagan, 492 U.S. 195, 202, 109 S. Ct. 2875, 2880, 106 L. Ed. 2d 166, 176 (1989). When reviewing the adequacy of Miranda warnings, an appellate court asks "simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by [Miranda].' " Id. at 203, 109 S. Ct. at 2880, 106 L. Ed. 2d at 177 (quoting California v. Prysock, 453 U.S. 355, 361, 101 S. Ct. 2806, 69 L. Ed. 2d 696, 702 (1981)).
>
> " 'In the present case, the warnings read to defendant in Spanish reasonably conveyed to defendant his Miranda rights and were therefore adequate. While defendant argues the term "corte de ley" has no meaning in Spanish, when defendant was asked in Spanish whether he understood his rights, defendant answered in the affirmative and signed the bottom of the waiver form. Moreover, a material part of the Miranda warning given -- that

> anything defendant said could be used against him -- was preserved in the translation.'
>
> "178 N.C. App. at 244-45, 631 S.E.2d at 195. See Annot., Suppression of Statements Made During Police Interview of Non–English–Speaking Defendant, 49 A.L.R. 6th 343 (2009).
>
> > " 'Whether an accused understood the Miranda warnings depends on the totality of the circumstances, not solely the skill of the interpreter. Nguyen v. State, 273 Ga. 389(2)(b), 543 S.E.2d 5 (2001). There is no requirement that Miranda warnings be given by a certified translator. In Nguyen, supra, this Court upheld the validity of Miranda warnings administered in Vietnamese by the defendant's son, who was not a certified interpreter. So long as the accused understands the explanation of rights, an imperfect translation does not rule out a valid waiver. Tieu v. State, 257 Ga. 281(2), 358 S.E.2d 247 (1987).' "
>
> "Delacruz v. State, 280 Ga. 392, 394, 627 S.E.2d 579, 583 (2006)."

Albarran, 96 So. 3d at 149–50 (emphasis added).

In support of his claim that he did not have the requisite level of understanding to make a valid waiver of his Miranda rights, Ruiz cites only Luong v. State, 199 So. 3d 98, 136-37 (Ala. Crim. App. 2013), rev'd on other grounds, 199 So. 3d 139 (Ala. 2014). Luong is not directly on point, however, because it concerned a defendant with limited English

proficiency who was advised of his rights in English; moreover, the Court concluded that the defendant had voluntarily waived those rights. In contrast, Ruiz was advised of his rights in Spanish, his primary language, and he does not argue that the translation of his rights into Spanish was inadequate, does not identify any specific defect in the translation, and makes no argument that he did not comprehend his rights as explained in Spanish.[6]

A Miranda warning need not be given in the exact form used in that decision, provided that the defendant understood the rights he or she was waiving. See Duckworth v. Eagan, 492 U.S. 195, 203 (1989) ("Reviewing courts ... need not examine Miranda warnings as if construing a will or defining the terms of an easement."); Jones v. State, 47 Ala. App. 568, 570, 258 So. 2d 910, 912 (Ala. Crim. App. 1972) (no precise language is required as long as the substance of the Miranda warning is given); Albarran, supra. Nor is it required that the translation be perfect or that

[6]Although the waiver was translated into Spanish for Ruiz, we note that the trial court found that Ruiz could understand some English. (R. 9-10.)

it be made by a certified translator. See Albarran, supra. Because the record indicates that Ruiz was sufficiently notified of and understood his Miranda rights and that he voluntarily waived his rights, we conclude that the trial court did not err in denying Ruiz's motion to suppress the statement he made following his arrest.

Regardless, any error that may have occurred is harmless. In his statement to Trooper Warr at the jail, Ruiz gave an account of his activities in the 24 hours before the accident and admitted that he had drunk some beer the night before. The account of Ruiz's activities was generally cumulative to evidence provided by Ruiz's friend who went with him to Birmingham. Ruiz's admission to having drunk beer was cumulative to the evidence of his BAC following the accident and to Trooper Warr's testimony that he smelled alcohol when he talked to Ruiz in the ambulance, that Ruiz had "glassy eyes" at that time, and that he saw open beer cans in Ruiz's truck.

B. Admissibility of Evidence of Ruiz's BAC

Ruiz argues that the trial court erred by admitting evidence of his BAC following the accident because, he says, he did not voluntarily and

knowingly consent to the drawing and testing of his blood. Ruiz correctly notes that the drawing of a person's blood constitutes a search, Birchfield v. North Dakota, 579 U.S. ___, ___, 136 S. Ct. 2160, 2173 (2016), and that, to justify a warrantless search, the State has the burden of establishing that consent was freely and voluntarily given. Acklin v. State, 790 So. 2d 975, 1007 (Ala. Crim. App. 2000). Ruiz apparently contends that his ostensible consent was not voluntarily given because the state trooper who obtained the consent interacted with him for only about three minutes and because the consent form was not adequately explained to him by his cousin Fernando, who translated the consent form into Spanish for Ruiz at the hospital. However, Ruiz does not cite any authority or make any argument specifically addressing the language barrier or the adequacy of the translation made at the hospital.

At the suppression hearing, the court heard testimony from State Trooper Jesse Oglesby, who went to the hospital to obtain a blood sample from Ruiz, and reviewed a video recording from Trooper Oglesby's body camera. (State's Hearing Ex. 2; R. 68.) The State also introduced the

voluntary consent form that Ruiz signed at the hospital. (C. 176; State's Ex. 55; R. 71.)

The State played the video in short increments and allowed the certified interpreter to translate the Spanish portions of the video into English. (R. 71.) The record reflects the following:

> "[Interpreter]: The paper there is that they're going to take blood and then, you know, drugs. And there's some things I couldn't hear, Your Honor. That's about what I heard.
>
> "....
>
> "[Interpreter]: 'Hearing that, is it fine that they're taking blood?'
>
> "[Interpreter]: 'Is it fine with you?'
>
> "....
>
> "[Interpreter]: 'And so that paper there is that they're going to take blood to see if you were drinking, taking drugs,' and then he turns, Your Honor, and I can't hear.
>
> "....
>
> "[Prosecutor]: All right. Trooper Oglesby, I want to go back to the very beginning of this video before the sound kicks in. We see in this video the defendant's brother or cousin holding the piece of paper. Is that the form that you were talking about? Do you recall?

"A. I believe it is. I believe I gave it to him to read so he would understand it better.

"[Prosecutor]: Okay. If you remember, was there an exchange between the cousin or brother and the defendant before the sound kicked in?

"A. I don't remember.

"....

"[Defense counsel]: In the video we see where you hand the forms to the cousin and I will just identify him as Fernando?

"A. Yes.

"[Defense counsel]: Did you see or do you remember Fernando reading the forms to Jorge?

"A. No, I don't remember that.

"[Defense counsel]: Okay. So the only indications that were given to [Ruiz] that this form was voluntary for him to sign would have been what we heard, because of Fernando, translate to [Ruiz]; is that right?

"A. Yes.

"[Defense counsel]: And so if cousin Fernando doesn't tell [Ruiz] that his signing this form is voluntary, in your opinion would this be a valid consent?

"A. Well, I believe we heard him say that -- ask if it was okay if we took it, which to me would imply that it's okay if he

> doesn't also, which would mean voluntary. He doesn't use the word voluntary, but I believe that's what he implies to [Fernando]."

(R. 70-73.)

The trial court heard the evidence, saw the video, and found that Ruiz voluntarily and knowingly gave consent for the taking of the blood sample. The trial court's factual findings are "presumed to be correct," Watson, ___ So. 3d at ___, and the trial court's ruling is supported by the record. Accordingly, there was no error in denying Ruiz's motion to suppress the evidence of his BAC following the accident.

III. Denial of Ruiz's Motion to Plead Guilty to the Two Nonfelony Offenses

Ruiz contends that his right to choose a plea was violated by the trial court's refusal to allow him to plead guilty to the nonfelony offenses of being a minor in possession of alcohol and driving without a license. At the hearing on the motions to suppress, held 12 days before trial, Ruiz sought to change his pleas to guilty on the two nonfelony offenses. The trial court denied the request, stating:

> "No. I think all of the counts on the indictment should travel together if he's going to go on trial. He could

> acknowledge guilt at trial if he needs to, but as far as presenting the case, you know, he's welcome to plea[d] at trial. But I think procedurally that would restrict the State's case, because there would be information they wouldn't be able to get in to, unless they elect to go ahead and allow him to plead it to a degree. Do you elect to do so?"

(R. 75.) The State declined to so elect, stating that "these facts giving rise to all three counts of the indictment arise out of the same common nucleus of facts and they need to travel together and they need to go to the jury as one." (R. 76.)

On appeal, Ruiz argues that the denial of his request to plead guilty to two of the charges was a structural error, and he contends that it is a type of structural error that is not subject to harmless-error analysis. Ruiz also cites Rule 14.2(c), Ala. R. Crim. P., for the proposition that a defendant may plead guilty, not guilty, or not guilty by reason of mental disease or defect. However, Ruiz does not make an adequate argument regarding structural error. Although he cites a number of cases for the generalized principle that a structural error is not subject to harmless-error analysis, he does not cite any cases similar to this case, and he does not explain how the alleged error here (a trial court's refusal to allow a

defendant to plead guilty to some but not all the charges against him) is a structural error. In addition, we note that in one of the cases Ruiz cites, Arizona v. Fulminante, 499 U.S. 279, 306 (1991), the United States Supreme Court noted that it "has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless."[7]

Further, it appears that Ruiz is actually challenging the joinder of the various offenses, and the issue of Ruiz not being allowed to enter a guilty plea to two of the offenses was not preserved for appellate review. During the suppression hearing, Ruiz's counsel "offered" to enter blind pleas on the two nonfelony offenses. (R. 75.) After the trial court stated that all of the counts should travel together, Ruiz did not disagree with the trial court or make an objection, nor did he make any argument to the trial court regarding joinder or explaining why it was error not to allow him to plead guilty to some of the charges. (R. 75-76.)

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[7]Ruiz also cites Stano v. Dugger, 921 F.2d 1125 (11th Cir. 1991), for the proposition that a defendant has a right to choose his or her plea even against the advice of counsel, but Stano is inapposite because the defendant in Stano had not been denied the right to choose his plea.

Regardless, this argument is without merit. Ruiz argues that joinder was not proper under Rule 13.3, Ala. R. Crim. P., because, he argues, the three offenses are not of "the same or similar character." Rule 13.3(a)(1). That argument fails because the offenses were properly joined under Rule 13.3(a)(2), which permits joinder of offenses that "[a]re based on the same conduct or are otherwise connected in their commission." Although Ruiz is correct in arguing that his failure to obtain a driver's license may have occurred at a different time than the accident, his "driving without a license" certainly was part of the same conduct that resulted in the death of Hayes, and the commission of all three offenses was clearly connected. Therefore, the trial court did not err in consolidating the three offenses for trial.

Finally, any error as to this issue was harmless. To the extent that the State was erroneously allowed to present evidence of the two nonfelony charges, that evidence was either not prejudicial with respect to the reckless-murder charge, was admissible as part of the circumstances surrounding the accident (the beer cans in and around Ruiz's truck), or was cumulative to other evidence.

IV. Ineffective-Assistance-of-Counsel Allegations

Ruiz argues that the trial court erred in denying his motion for a new trial with respect to the allegations of ineffective assistance of counsel, including his claims that his trial counsel (1) failed to obtain the services of an expert to review the EDR, (2) failed to obtain an expert relating to Ruiz's BAC, (3) failed to request a jury instruction regarding the presumption that Ruiz was not intoxicated, and (4) failed to present mitigating evidence at sentencing. The motion was not supported by an affidavit or by any evidence not presented at trial. As noted, the motion was denied by operation of law, without the trial court having made any findings of fact or conclusions. (C. 139-41.)

On appeal, Ruiz reiterates the ineffective-assistance-of-counsel claims he asserted in his motion for a new trial, and he asserts that he was entitled to a hearing on those claims. With respect to the merits of the underlying claims, Ruiz does not make an argument that complies with Rule 28(a)(10), Ala. R. App. P. Rather, Ruiz's brief on appeal merely restates the claims asserted below and then argues that the trial court

erred in allowing the motion to be denied by operation of law without a hearing.

Further, Ruiz does not demonstrate that the trial court erred in failing to hold a hearing. In Hill v. State, 675 So. 2d 484, 486 (Ala. Crim. App. 1995), one of the cases cited by Ruiz on this issue, this Court stated:

> "In Similton v. State, 672 So. 2d 1363 (Ala. Crim. App. 1995), this court held that if a motion for a new trial is not supported by an affidavit, this court will not reverse the trial court's judgment and remand the cause to the trial court for a hearing on the allegations contained in the motion for a new trial. However, in this case, the allegations of ineffective assistance of counsel are supported by facts contained in the record."

In the present case, Ruiz's allegations are not supported by facts contained in the record or by an affidavit, and Ruiz does not make any argument or cite any authority as to how his counsel performed deficiently or how he was prejudiced. See Strickland v. Washington, 466 U.S. 668 (1984).

Conclusion

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, McCool, and Minor, JJ., concur. Cole, J., dissents, with opinion.

COLE, Judge, dissenting.

This Court's per curiam decision affirms Jorge Ruiz's convictions for reckless murder, a violation of § 13A-6-2(a)(2), Ala. Code 1975, driving without a license, a violation of § 32-6-1, Ala. Code 1975, and being a minor in possession of alcohol, a violation of §§ 28-1-5 and 28-3A-25(a)(18), Ala. Code 1975, and his resulting consecutive sentences of 99 years' imprisonment for the murder conviction, and 3 months in jail for the minor-in-possession-of-alcohol conviction. Because I believe that precedent of this Court and the Supreme Court of Alabama requires that we reverse Ruiz's conviction for reckless murder, I respectfully dissent.

On October 28, 2018, at approximately 6:00 a.m., Ruiz was involved in an automobile crash on U.S. Highway 31, north of Prattville. Ruiz's full-sized pickup truck crossed the center line and struck a small automobile being driven by Marlena Hayes. Hayes was pronounced dead at the scene.

On the prior evening, Ruiz and three friends had driven to a party or a music festival in Birmingham. They left the festival around 1:00 a.m.

and drove back to the house of one of the friends. Ruiz slept on the couch until he left around 5:00 a.m.

In a statement given to police, Ruiz informed the officer that, on the day before the crash, he woke up at 4:15 a.m., drove from Prattville to Auburn, worked all day, and returned to Prattville. That evening, Ruiz and his friends drove to Birmingham, where they attended the music festival, and went to a friend's house early the following morning.

State Trooper Danny Warr, who investigated the crash, estimated that Ruiz was traveling approximately 70 miles per hour in an area where the speed limit was 55 miles per hour. The expert who examined the event data recorder ("EDR") on Ruiz's truck calculated his speed to be 74.7 miles per hour at 5 seconds before the crash.[8] The crash occurred in the northbound lane, which was the lane Hayes was traveling in, and the

[8]The EDR expert testified that the EDR and the speedometer indicated a speed of 70 miles per hour. However, the expert calculated Ruiz's speed to be 74.7 miles per hour, based on a size tire that was on the truck that was different from the original-equipment tires. According to the expert, because of the different tire size, the speedometer and the EDR would indicate a speed less than the actual speed.

EDR on Ruiz's truck did not show that Ruiz's truck swerved or turned sharply in the five seconds before the crash.

Ruiz did not testify at trial, but the State played a video recording of his statement to Trooper Warr after his arrest. Ruiz told Trooper Warr that he did not remember much about the crash but stated that he lost control in a curve and entered the opposite lane. Ruiz stated that he did not remember what caused him to lose control.

Testing on blood samples obtained from Ruiz at the hospital revealed that his blood-alcohol content was .016%, below the .02% level at which persons under the age of 21 years are prohibited to drive a vehicle. See § 32-5A-191(b), Ala. Code 1975. The State did not charge Ruiz with driving under the influence, and the indictment did not allege that Ruiz was intoxicated.

Ruiz's trial began on July 22, 2019. The trial court instructed the jury on reckless murder and the lesser-included offenses of reckless manslaughter, a violation of § 13A-6-3(a)(1), Ala. Code 1975, and criminally negligent homicide, a violation of § 13A-6-4(a), Ala. Code 1975. The jury returned guilty verdicts on reckless murder and the two

nonfelony charges. On August 14, 2019, the trial court sentenced Ruiz as set forth above.

The majority notes that § 13A-6-2(a)(2), Ala. Code 1975, states:

> "A person commits the crime of murder if he or she does any of the following: ... Under circumstances manifesting extreme indifference to human life, he or she recklessly engages in conduct which creates a grave risk of death to a person other than himself or herself, and thereby causes the death of another person."

Section 13A-2-2(3), Ala. Code 1975, defines "recklessly" as:

> "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation...."

(Emphasis added.)

In King v. State, 505 So. 2d 403, 405-07 (Ala. Crim. App. 1987), a case where the defendant shot into an occupied vehicle, this Court discussed the elements of reckless murder:

> " 'The function of this section [§ 13A-6-2(a)(2)] is to embrace those homicides caused by such acts as driving an automobile in a grossly wanton manner,

> shooting a firearm into a crowd or moving train, and throwing a timber from a roof onto a crowded street. Napier v. State, 357 So. 2d [1001] at 1007 [(Ala. Crim. App. 1997)].'

"[Northington v. State, 413 So. 2d 1169] at 1172 [(Ala. Crim. App. 1981)]. The Supreme Court of Alabama subsequently adopted this interpretation. Ex parte Washington, 448 So. 2d 404, 408 (Ala. 1984); Ex parte McCormack, 431 So. 2d 1340 (Ala. 1983).

"In Ex parte Weems, 463 So. 2d 170, 172 (Ala. 1984), the Supreme Court, in an opinion by Justice Faulkner, stated the following:

> " 'Alabama's homicide statutes were derived from the Model Penal Code. In providing that homicide committed "recklessly under circumstances manifesting extreme indifference to human life" constitutes murder, the drafters of the model code were attempting to define a degree of recklessness "that cannot be fairly distinguished from homicides committed purposely or knowingly." Model Penal Code and Commentaries, § 210.02, Comment, 4 (1980). That standard was designed to encompass the category of murder traditionally referred to as "depraved heart" or "universal malice" killings. Examples of such acts include shooting into an occupied house or into a moving automobile or piloting a speedboat through a group of swimmers. See LaFave & Scott, Criminal Law, § 70 (1972).'

"We find in a discussion of 'depraved heart murder' in LaFave & Scott, Criminal Law, § 70 (1972), the following:

> " 'For murder the degree of risk of death or serious bodily injury must be more than a mere unreasonable risk, more even than a high degree of risk. Perhaps the required danger may be designated a "very high degree" of risk to distinguish it from those lesser degrees of risk which will suffice for other crimes.... Although "very high degree of risk" means something quite substantial, it is still something less than certainty or substantial certainty. The distinctions between an unreasonable risk and a high degree of risk and a very high degree of risk are, of course, matters of degree, and there is no exact boundary line between each category; they shade gradually like a spectrum from one group to another.'
>
> "....

"Section 13A-6-2(a)(2) requires the prosecution to prove conduct which manifests an extreme indifference to human life, and not to a particular person only. Its gravamen is the act of reckless by engaging in conduct which creates a grave or very great risk of death under circumstances 'manifesting extreme indifference to human life.' What amounts to 'extreme indifference' depends on the circumstances of each case, but some shocking, outrageous, or special heinousness must be shown. Commentary to § 13A-6-2(a)(2); Northington, supra. A person acts recklessly when he is aware of and consciously disregards a substantial and unjustifiable risk. § 13A-2-2(3). 'The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.' Id. To bring appellant's conduct within the murder statute, the State is required to establish that his act was imminently dangerous and presented a very high or grave risk

> of death to others and that it was committed under circumstances which evidenced or manifested extreme indifference to human life. The conduct must manifest extreme indifference to human life generally. Ex parte McCormack, supra; Northington, supra. The crime charged here differs from intentional murder in that it results not from a specific, conscious intent to cause the death of any particular person, but from an indifference to or disregard of the risks attending appellant's conduct."

(Emphasis added.)

The evidence presented during Ruiz's trial was insufficient to support a conviction for reckless murder for two reasons. First, Ruiz's conduct did not involve circumstances that manifest extreme indifference to human life. The majority relies primarily upon Allen v. State, 611 So. 2d 1188, 1189–93 (Ala. Crim. App. 1992), in which this Court discussed the element of "manifest[ing] indifference to human life" in the context of a vehicle crash. The Court stated:

> "Where we have previously found the evidence to be sufficient to support a conviction for reckless murder, the defendant was clearly operating his vehicle in a 'grossly wanton manner' or under circumstances exhibiting 'some shocking, outrageous, or special heinousness.' See Davis v. State, 593 So. 2d [145,] 148 [Ala. Crim. App. 1991)] (defendant, who had a blood alcohol content of .237%..., 'drove through dense fog at speeds of between 75 and 88 miles per hour' and 'hit the victims' vehicle head-on in their lane of traffic');

> Patterson v. State, 518 So. 2d [809,] 810-11, 816 [Ala. Crim. App. 1987)](defendant, who had a blood alcohol content of .3%,... was driving at a speed of between 50 and 70 miles per hour when his vehicle crossed the median, without appearing to brake, and struck the victim's car); Smith v. State, 460 So. 2d [343,] 345 [(Ala. Crim. App. 1984)] (defendant, who had a blood alcohol content of .25%, 'collided head-on' with the victims' vehicle); Slaughter v. State, 424 So. 2d [1365,] 1366-67 [(Ala. Crim. App. 1982)] (defendant, who had a blood alcohol content of between .16% and .19% ..., was speeding, ' "fishtailing and ricocheting back and forth from one side to the other," ' and 'traveling "like [his car] was out of control," ' prior to crossing the oncoming lane of traffic, 'jump[ing] the curb and str[iking] the victim as she was working in her front yard'); Jolly v. State, 395 So. 2d [1135,] 1137-38 [(Ala. Crim. App. 1981)] (defendant was driving fast and ' "wobbling" ' on the road, then drove 'off the road and traveled through the front of several yards' before colliding with the vehicle in which the victim was a passenger)...."

In Allen, this Court affirmed the reckless-murder conviction where the defendant was driving while intoxicated and was weaving before he crossed the centerline of the highway and struck another car head-on. Allen, 611 So. 2d at 1188.

Although the majority finds otherwise, I believe that this case does not involve the aggravating factors present in Allen, the cases cited in Allen, or in other cases in which the Alabama appellate courts affirmed a conviction for reckless murder involving a vehicular wreck. See

Hammonds v. State, 7 So. 3d 1055, 1063 (Ala. 2008) (upholding conviction where defendant was intoxicated and driving erratically before collision). At the time that Ruiz was tested, he had .016% blood-alcohol content. Allen's blood-alcohol content, in a case that this Court called a "close question," was more than 10 times Ruiz's blood-alcohol content. Although the majority correctly points out that Ruiz's actual blood-alcohol level at the time he was driving was higher than .016% because of the passage of time between the wreck and the taking of his blood, we do not have the benefit of knowing how much higher Allen's blood-alcohol level may have been at the time of his wreck as opposed to the reported level of .163% when Allen's blood-alcohol content was determined. Furthermore, the majority quotes Allen in detail and includes numerous other cases referenced in Allen, but it appears that every case cited therein involving an alcohol-related wreck in which the defendant's blood-alcohol level was listed involved an individual whose blood-alcohol level was over the legal limit of .08% and every defendant had a blood-alcohol level approximately two to four times higher than it was believed Ruiz's was at the time of his wreck.

Ruiz had consumed alcohol before the accident, but he was not determined to be legally intoxicated, nor was he charged with driving under the influence of alcohol. Although he crossed to the wrong side of the road, there was no evidence that he was racing or driving in a grossly wanton manner, and clear weather conditions with light traffic did not require unusual caution. Although Ruiz was driving at almost 20 miles per hour in excess of the speed limit, we cannot conclude that his speed was, by itself, sufficient to manifest extreme indifference to human life. Trooper Warr testified that most of the drivers he stops for speeding are driving between 5 and 20 miles per hour over the speed limit. Thus, Ruiz's actions did not exhibit "an extreme indifference to human life."

After reviewing the evidence presented in this case, I am also of the opinion that this case does not involve the "shocking, outrageous, or special heinousness" required to support a conviction for reckless murder. Although the charge of reckless murder does include an element of reckless conduct, this "shocking, outrageous, and special heinousness" requirement is a high standard that exceeds mere recklessness. In Langford v. State, 354 So. 2d 313, 314 (Ala. 1977), the Court addressed a

more egregious set of facts in which the defendant, who was charged with a predecessor universal-malice murder, was driving with a blood-alcohol level of .25% and was traveling "in excess of 90 miles per hour immediately preceding the collision." The Court in Langford held that the trial court should have granted the defendant's motion for a directed verdict as to the murder charge, but it determined that there was sufficient evidence to submit the case to the jury on the lesser-included offenses. As the majority notes, this Court, in Watson v. State, 504 So. 2d 339 (Ala. Crim. App. 1986), also addressed the issue whether the State had proven that the defendant was guilty of reckless murder. In Watson, a

> "bus and the appellant's car were going up a hill, [and] the appellant passed the bus even though it was in a no-passing zone. The appellant's speed was approximated at 70 miles per hour. The speed limit in the area was 55 miles per hour.
>
> "After the appellant passed the bus, the no-passing zone ended. As the appellant's vehicle reached the top of the hill, she hit the victim, who was walking across the road.
>
> "A sample of the appellant's blood and alcohol was submitted to the Department of Forensic Sciences. The blood sample tested negative for the presence of alcohol. The urine specimen revealed the presence of 1.0 micrograms per

> milliliter of mezaretazine. Mezaretazine is a major tranquilizer which .... may cause driving problems such as drowsiness or slowing of response time."

Id. at 340. Watson was convicted of murder under § 13A-6-2(a)(2), Ala. Code 1975. In reversing Watson's conviction, the Court held that

> "the appellant's conduct, which resulted in the victim's tragic death, is evidence of a high degree of recklessness. This degree of recklessness can, 'however, be distinguished from the extreme indifference to human life displayed by a person who commits an intentional homicide.' [Ex parte] Weems, [463 So. 2d 170, 173 (Ala. 1984]....
>
> "There is no evidence that [Watson] realized the likelihood of hitting this victim or any other; and the consequent loss of the victim's life; and proceeded in the face of such probabilities. (Citation omitted).
>
> "Without evidence to this effect, the appellant's conduct does not constitute murder under § 13A-6-2(a)(2)."

Id. at 347. I am of the opinion that Langford is controlling authority and that any attempt in Allen to distinguish Langford based upon an alleged reluctance of the Langford Court to properly determine the applicability of a murder statute on the basis that "there had not, prior to Langford's conviction, been a conviction for first degree murder arising out of a driving under the influence situation" is an unfair judgment of that Court.

To a greater degree than the actions of the defendants in Langford and Watson, Ruiz's actions do not rise to the required level necessary to sustain a murder conviction, even when the evidence is viewed in a light most favorable to the prosecution.

Two additional factors that should be considered in weighing whether Ruiz's actions were merely reckless or if they rise to the requisite level of "shocking, outrageous, and special heinousness" involve testimony about the tires of Ruiz's vehicle and the time of the offense. Although the actual speed of his vehicle was approximately 74.7 miles per hour at the time of the wreck, testimony indicated that the speed displayed on the speedometer of Ruiz's vehicle would have been approximately 5 miles per hour slower. This difference between Ruiz's actual speed and his apparent speed may not have been known by Ruiz. Next, the undisputed evidence presented at trial established that any alcohol that was in Ruiz's system when he was on his way to work had been consumed the night before the wreck and that Ruiz had not consumed alcohol for at least five hours before the wreck and had slept for several hours after consuming alcohol. Although it could be simple negligence for a 19-year-old to not realize that

changing tires could alter the accuracy on one's speedometer or to fail to realize how long alcohol would remain in his system after sleeping for the night, I believe these factors weigh in favor of a finding of simple recklessness and against a finding of gross wantonness that is required to sustain a conviction for murder.

Although the majority is clearly correct in assessing the tragic nature of this wreck, I do not view Ruiz as having acted in a "grossly wanton manner." For a conviction to be sustained for reckless murder, the degree of recklessness should be so great that it "cannot be fairly distinguished from homicides committed purposely or knowingly." Although Ruiz was reckless, I do not view his actions in the same category or culpability as those of an individual who intentionally takes another person's life. Thus, I would hold that the evidence was insufficient to support Ruiz's conviction for reckless murder, and I would reverse that conviction.

In addition to arguing that the State presented insufficient evidence to support his conviction for reckless murder, Ruiz also argues that there was insufficient evidence to support a conviction for the lesser-included

offenses of reckless manslaughter and criminally negligent homicide. Although the majority was not required to address this issue because of its affirmance of Ruiz's conviction for reckless murder, I will address the issue whether there was sufficient evidence to establish the elements of either of those offenses. Because reckless manslaughter is the first lesser-included offense that would have been considered by the jury had Ruiz's motion for a judgment of acquittal as to the reckless-murder charge been granted, I will address the applicability of reckless manslaughter first.

Section 13A-6-3(a) states, in part, that "[a] person commits the crime of manslaughter if: (1) He recklessly causes the death of another person." Section 13A-2-2(3) provides that "[a] person acts recklessly ... when he is aware of and consciously disregards a substantial and unjustifiable risk," and the risk must be "of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe." Reckless manslaughter differs from reckless murder primarily in that it does not require proof that the defendant acted "under circumstances manifesting extreme indifference to human life." However, both offenses require proof of recklessness. The

State argues on appeal that speeding alone or drowsy driving coupled with disregard of premonitory symptoms could constitute the conscious disregard of a substantial and unjustifiable risk necessary to establish recklessness. I agree that there was sufficient evidence to establish that Ruiz committed the offense of reckless manslaughter.

The evidence at trial established that the day before the wreck Ruiz worked all day in Auburn then returned to Prattville. He then went to a music festival or party in Birmingham where he drank an unknown amount of beer. He left the festival around 1:00 a.m. and went back to the house of one of his friends. Ruiz slept on the couch until he left at 5:00 a.m. to drive back to Prattville. When he was almost to his home in Prattville, he lost control of his truck going around a curve, crossed the center line, and struck the automobile driven by Hayes at 6:15 a.m. Evidence viewed in a light most favorable to the prosecution established that Ruiz was driving at a speed of 74.7 miles per hour on a road where the speed limit was 55 miles per hour, but his speedometer read 70 miles per hour. He also had a blood-alcohol level of .016% from a blood sample taken approximately four hours after the wreck. Dr. Harper testified that

the average elimination rate of alcohol from an individual's system is .015% per hour. The wreck occurred outside Ruiz's designated driving lane, the EDR information indicated that Ruiz's truck did not swerve or turn immediately before impact, and there was evidence indicating that he did not apply his brakes before the wreck. Ruiz did not recall why he lost control of his vehicle.

As the State notes, other jurisdictions have held that "[s]peeding alone can provide the evidentiary basis for a reckless manslaughter conviction, irrespective of whether drowsy driving is coupled with it. See People v. Griffith, 372 N.E.2d 404, 407 (Ill. Ct. App. 1978)." (State's brief, p. 33.) In this case, there were several aggravating factors in addition to Ruiz driving 15-20 miles per hour over the posted speed limit. Ruiz also had had very little sleep before the wreck, and his blood-alcohol level was determined to be .016% approximately four hours after the wreck. Driving under those circumstances is reckless because it constitutes a "deviation from the standard of conduct that a reasonable person would observe in the situation." § 13-2-2(3), Ala. Code 1975. I also note that the similar conduct of the defendants in Langford and Watson outlined

previously in this opinion were also held to be sufficient to support a finding of guilt for the lesser-included offense of reckless manslaughter. Therefore, I would hold that the State presented sufficient evidence to prove that Ruiz was guilty of reckless manslaughter.

Because the State presented sufficient evidence to prove beyond a reasonable doubt that the defendant was guilty of reckless manslaughter, discussion of the applicability of criminally negligent homicide as a lesser-included offense of reckless manslaughter and reckless murder is not required.

Based on the foregoing, I would reverse the trial court's judgment adjudicating Ruiz guilty of reckless murder. "State and federal appellate courts have long exercised the power to reverse a conviction while at the same time ordering the entry of judgment on a lesser-included offense." Ex parte Edwards, 452 So. 2d 508, 510 (Ala. 1984). Therefore, I would remand this case to the trial court with instructions to adjudicate Ruiz guilty of reckless manslaughter and to sentence him for that offense. Finally, I concur in the majority's decision as to the other issues raised by

Ruiz, and I would affirm Ruiz's convictions and sentences for driving without a license and being a minor in possession of alcohol.