No. 37413-1-III

100338-2

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

GENARO VISOSO, Petitioner

APPEAL FROM THE SUPERIOR COURT

OF GRANT COUNTY

THE HONORABLE JUDGE JOHN M. ANTOSZ

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner Genaro Visoso, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Genaro Visoso seeks review of the Court of Appeals unpublished opinion entered on September 28, 2021. A copy of the opinion is attached as an appendix.

III. ISSUES PRESENTED FOR REVIEW

A. More than ordinary negligence in operating a motor vehicle is required to sustain a conviction for vehicular homicide. Did the Court of Appeals incorrectly affirm the conviction when the State did not meet its burden to prove reckless driving and disregard for the safety of others?

IV. STATEMENT OF THE CASE

Grant County prosecutors charged Genaro Visoso with vehicular homicide, alleging he operated a vehicle in

a reckless manner while under the influence of intoxicating liquor, or with disregard for the safety of others. CP 133.

On the afternoon of October 20, 2017, Genaro Visoso drove home from work on a north-sound road; the weather was clear, and the road was dry. RP 535, 649, 684. He drove the speed limit, or possibly 3 or 4 miles over it. RP 697. He became distracted when he reached to retrieve his cell phone. RP 688, 694. He did not see a "stop ahead" sign or the stop sign at an intersection. RP 546-47,690.

He failed to stop at the intersection, and his car collided with a car driven in an east-west direction by Kelly Norris. RP 412, 421. Both cars were in their assigned travel lanes. RP 535. Mr. Norris expired at the scene. RP 489,998. Mr. Visoso was injured and transported to the hospital. RP 638. At the hospital, his blood was sent for testing, which when calculated for

whole blood alcohol conversion registered 0.068. RP 1195-96.

There were no witnesses to the accident. An accident reconstructionist testified both parties drove the speed limit. RP 619. He did not take measurements but estimated the stop sign warning to be about 700 feet before the stop sign. RP 547, 566, 592. He calculated it would have taken Mr. Visoso under 10 seconds to travel between the warning sign and the intersection stop sign. RP 621. He said the warning sign would have been visible for some distance. RP 572.

The court provided jury instruction No. 10:

> To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.
> Disregard for the safety of others means an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than ordinary negligence. Ordinary negligence is the failure to exercise ordinary care. Ordinary negligence is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or

> the failure to do something which a reasonably careful person would have done under the same or similar circumstances. Ordinary negligence in operating a motor vehicle does not render a person guilty of vehicular homicide. CP 296.

A jury found Mr. Visoso guilty of vehicular homicide. CP 300. By special verdict, it found Mr. Visoso operated his car in a reckless manner and with disregard for the safety of others. CP 300-01. Mr. Visoso appealed. RP 340-41.

In its opinion, the Court of Appeals affirmed the conviction. See Appendix.

V. ARGUMENT

RAP 13.4(b) provides a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

ISSUE: Whether this Court should accept review under RAP 13.4(b) (2), (b)(3) and (b)(4) because case law exemplifying driving in a reckless manner and with disregard for the safety of others does not encompass the ordinary negligence of this case.

Review by this Court is merited because the Court of Appeals' decision extends the definition of recklessness and disregard for the safety of others to include ordinary negligence.

The word "reckless manner" is a term of art not defined in either the vehicular homicide or vehicular assault statutes. The definition is found in case law: to operate a vehicle in a "reckless manner" means to drive in a "heedless, or rash manner or a manner indifferent to the consequences." *State v. Roggenkamp,* 153 Wn.2d 614,

613, 106 P.3d 196 (2005). To drive in a reckless manner requires far more than ordinary negligence or even disregard for others' safety. *State v. Brobak,* 47 Wn.App. 488, 736 P.2d 288 (1987); *State v. Partridge*, 47 Wn.2d 640, 645, 289 P.2d 701 (1955). To be sufficient to sustain a conviction for vehicular homicide, a defendant's actions must be egregious, involving speeding or engaging in notably dangerous behavior at the time of the accident. Case law provides examples of the difference between ordinary negligence and egregious recklessness and disregard for others' safety.

In *Roggenkamp,* the defendant drove over 70 miles per hour in a 35 mph speed zone. He attempted to pass another car that was also speeding. *State v. Roggenkamp,* 115 Wn.App. 927, 933, 64 P.3d 92 (2003). Roggenkamp braked when he saw a car turn into the upcoming intersection and pull over. The brakes on Roggenkamp's car locked, his vehicle skidded into

another car entering the intersection, resulting in the death of the car occupant. The Court held Roggenkamp drove in a reckless manner. The speeding and passing of another speeding car was notably dangerous behavior,

Similarly, in *State v. Baker,* the defendant drove 30 to 35 miles per hour through a very crowded intersection where an officer was directing traffic. *State v. Baker,* 56 Wn.2d 846, 862, 355 P.2d 806 (1960). Baker swerved his car across the center lane and struck the officer.

In *State v. Hill,* 48 Wn.App. 344, 739 P.2d 707 (1987), the defendant drove recklessly when she drove into oncoming traffic as she entered the freeway while intoxicated. She made no effort to avoid the oncoming traffic.

In *State v. Kenyon,* 123 Wn.2d 720, 71 P.2d 144 (1994), the defendant drove 15 to 30 miles an hour faster than the posted speed limit, at night, on a slippery wet road, with two overinflated tires and one flat tire. He lost

control of the car, fishtailed, and collided with a minivan, killing his passenger and injuring himself and others. *Id.* The Court pointed to the speed, road conditions, condition of the car tires, and Kenyon's erratic accelerations and decelerations. It found "the elemental factor of reckless driving more likely than not flowed from the proved fact of Kenyon's excessive speed." *Id.* at 724.

Here, none of the defining actions of driving in a rash or heedless manner, indifferent to the consequences, are present. Mr. Visoso did not egregiously exceed the speed limit. He did not drive too fast for road conditions. He did not change lanes. He did not swerve. He did not cross the centerline of the road. He did not drive into oncoming traffic. Instead, he did what countless others have done: he took his eyes off the road when he reached for his cell phone. Such momentary negligence does not provide evidence of driving in a reckless manner.

Likewise, disregard of others' safety is distinct from ordinary negligence and driving in a reckless manner. It is “an aggravated kind of negligence or carelessness, falling short of reckless but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed with the term ‘negligence.’” *State v. Eike,* 72 Wn.2d 760, 765-66, 435 P2d 680 (1967). It is a state of careless that requires *some evidence of a conscious disregard* of the danger of the probability that injury to another will occur. *State v. Vreen,* 99 Wn.App. 662, 671, 994 P.2d 905 (2000) (aff'd, 143 Wn.2d 923, 26 P.3d 236 (2001)(abrogated on other grounds, *Rivera v. Illinois*, 556 U.S. 148, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009); *State v. May*, 68 Wn.App, 491, 496, 843 P.2d 1102 (1993).

There must be an act which a reasonably cautious person would not do in similar circumstances to reach the level of conscious disregard. *State v Imokawa,* 4 Wn.

App.2d 545, 422 P.3d 402 (2018)(reversed on other grounds, 194 Wn.2d 391, 450 P.3d(2019)).

In *Imokawa,* the defendant tailgated the car in front of him, exceeding the speed limit, moving faster than other vehicles in traffic. He tried to pass by using the right-hand lane. After passing, he re-entered the lane without sufficient distance, striking the victim's car. His vehicle overturned and slid sideways into oncoming traffic. The jury there found he drove with disregard for the safety of others but not reckless driving. *Imokawa,* 194 Wn.2d at 396. The Court reasoned there was sufficient evidence to prove he operated the car with disregard for the safety of others based on tailgating, speeding, and gross misjudgment of space for the lane change. *Id.*

The Court found disregard for the safety of others where a defendant drove his car at night on a wet highway. He rounded a curve, moved onto the wrong side

of the road while driving 45-50 miles per hour, and caused a head-on collision with an oncoming vehicle. *State v. Eike,* 72 Wn.2d 760. Similarly, the Court held in *State v. Miller,* 60 Wn.App. 767, 775, 807 P.2d 893 (1992), that driving on the wrong side of the road one with one headlight out established both recklessness and disregard for the safety of others.

Again, the Court found recklessness and disregard in *State v. Fateley,* 18 Wn.App. 99, 103, 566 P.2d 959 (1977) when the defendant drove his motorcycle across the centerline and over an embankment. In *Barefield,* the defendant caused two deaths by crossing the center line and driving under the influence of alcohol. *State v. Barefield,*57 Wn.App. 444,459, 735 P.2d 1339 (1987).

Here, the State presented no evidence of a conscious disregard of the danger of the probability that injury to another would occur. Mr. Visoso drove the speed limit and stayed within his lane. His car was the only car

on the north-south road. Reaching for his cell phone and taking his eyes off the road does not establish the conscious disregard for the safety of others or reckless driving, as shown in case law.

Ordinary negligence is the failure to exercise ordinary care. Ordinary negligence is the doing of some act which a reasonably careful person would *not* do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances. Ordinary negligence in operating a motor vehicle does not render a person guilty of vehicular homicide. The evidence is insufficient to sustain the conviction.

VI. CONCLUSION

Based on the preceding facts and authorities, Mr. Visoso respectfully asks this Court to accept his petition.

This document contains 1,868 words excluding the parts of the document exempted from the word count by RAP 18.17.

Submitted this 28th day of October 2021.

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APPENDIX

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. GENARO VAZQUEZ VISOSO, Appellant.	)))))))))	No. 37413-1-III UNPUBLISHED OPINION

STAAB, J. — A driver is guilty of vehicular homicide if a person dies "within three years as a proximate result of injury proximately caused . . . by the driver [who] was operating a motor vehicle: (a) [w]hile under the influence of intoxicating liquor or any drug . . .; or (b) [i]n a reckless manner; or (c) [w]ith disregard for the safety of others." RCW 46.61.520. On the afternoon of October 20, 2017, while reaching for his cell phone, Genaro Visoso ran a stop sign while speeding into arterial cross traffic and collided with the vehicle of Kelly Norris killing him instantly. Mr. Visoso was transported to the hospital where health care workers observed that he was intoxicated. The State charged Mr. Visoso with vehicular homicide under all three alternative means. Collision reconstruction and intoxication experts testified at trial. The jury unanimously found Mr. Visoso guilty on the reckless and disregard prongs but were not unanimous as

to the intoxication prong. Mr. Visoso timely appealed arguing that there was insufficient evidence to convict because reaching for his cell was only ordinary negligence. Finding the evidence sufficient, we affirm.

FACTS

On October 20, 2017, Mr. Visoso was driving on Road K Northwest in rural Quincy, Washington. At the same time, Mr. Norris was driving on east-west Road 9 Northwest in his assigned lane. The speed limit on Road 9 is 55 m.p.h. The speed limit on road K is 50 m.p.h. Where the two roads intersect, Road K has a stop sign and Road 9 does not. On Road K, 729 feet prior to the intersection stop sign, there is a "stop ahead" sign. On that day, at approximately 3:15 p.m., Mr. Visoso without braking failed to stop at the Road K stop sign and T-boned the front driver side of Mr. Norris' vehicle. Both cars were going approximately the same speed before impact. Both cars flipped and rolled southeast into the field. Mr. Visoso's car caught fire. *Id.*[1] Mr. Norris died at the scene of the collision.

Mr. Visoso was transported approximately seven miles to the Quincy Valley Medical Center due to his injury.[2] One of the transporting emergency medical technicians (EMTs) noticed that Mr. Visoso's breath smelled like alcohol and informed

[1] A passer-by stopped and pulled Mr. Visoso out of his burning car but did not see the collision. Other than the defendant, there were no eye-witnesses to the collision.

[2] Mr. Visoso had a broken leg, rib fractures, a broken wrist, a broken foot, internal lacerations to his liver and spleen, and other lesser injuries.

the deputy on duty. At some time prior to arrival at the hospital around 4:15 p.m., another EMT drew Mr. Visoso's blood and sent it for testing at the hospital laboratory. The hospital laboratory result indicated 0.082 grams per 100 milliliters blood alcohol which the treating doctor considered elevated.[3] At trial, the treating doctor testified regarding the impairing effects of alcohol including slowed reaction times, altered cognitive ability and affected memory, and the rate at which alcohol dissipates from the body. He noted that pain masks impairment.

A trained drug recognition expert officer responded to the hospital and contacted Mr. Visoso where she noted the odor of alcohol, slurred speech and slow response. She was unable to get another blood sample from Mr. Visoso due to his medical condition which required helicopter transport to Confluence Health Central Washington Hospital (CHCW). The attending orthopedic surgeon at CHCW noted that Mr. Visoso slurred his words, smelled of alcohol and had an elevated blood alcohol level resulting in the medical conclusion that Mr. Visoso was intoxicated and could not give informed consent to surgery. The surgeon felt that concussion, or the administration of Fentanyl for pain would not explain the signs of intoxication observed at CHCW.

[3] Mr. Visoso's rebuttal expert testified that the blood alcohol conversion factor between serum blood and whole blood was 1.20 and would modify the 0.082 serum result to 0.068 whole blood level. Hospitals use serum results and the Washington State Toxicology Laboratory uses whole results.

The State charged Mr. Visoso with vehicular homicide under all three prongs: operating a vehicle (1) in a reckless manner, (2) while under the influence of intoxicating liquor or any drug defined in RCW 46.61.502, or (3) with disregard for the safety of others.

At trial, officers testified to Mr. Visoso's statements, and the State played Mr. Visoso's redacted body camera statement, recorded six days after the collision. He indicated that at the time of the collision he was driving between 53 and 58 m.p.h., which is above the posted 50 m.p.h. speed limit. He told investigating officers that the collision occurred because he became distracted when he reached for his cell phone on the vehicle floor. He admitted that he would typically pull over in a situation like this, but did not this time. When asked how he could have avoided the collision, he indicated "[p]ay more attention to the road." Report of Proceedings (RP) at 695. He denied drinking alcohol the day of the collision. He estimated that he had previously traveled Road K eight to ten times but denied being aware of any road signs. On the day of the collision, he indicated that he did not see the "stop ahead" warning sign or the stop sign at the intersection with Road 9. RP at 690. Mr. Visoso indicated that his vehicle was in good working order and that he has good eyesight and does not need corrective lenses.

At trial, the accident reconstructionist assumed that both vehicles were moving at their respective speed limits. The day of collision was clear with dry road conditions. He calculated it would have taken Mr. Visoso approximately 10 seconds to drive from the

warning sign to the stop sign. He also indicated that a person with good vision could see the warning sign from approximately 1500 feet further up the road. This visibility point is approximately 2200 feet from the actual intersection stop sign. He concluded that visibility of the intersection was "great." RP at 572. A driver traveling the posted speed limit would have had about 30 seconds from the warning visibility point until the intersection in which to take action.

The jury found Mr. Visoso guilty of vehicular homicide. By special verdict, they indicated unanimous guilt under the reckless manner and disregard prongs. The jury was not unanimous with regard to operating a vehicle under the influence of intoxicants prong. Mr. Visoso timely appealed.

ANALYSIS

Mr. Visoso argues that there is insufficient evidence to support his conviction for vehicular homicide. He contends that reaching for his cell phone constitutes ordinary negligence which is insufficient to support vehicular homicide. We disagree and find the evidence sufficient. The jury was not required to accept Mr. Visoso's explanation of the accident. The evidence presented at trial is sufficient to support the jury's finding that Mr. Visoso drove in a reckless manner and with disregard for the safety of others.

Sufficiency of the evidence is reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Washington follows the standard of review for a challenge to the sufficiency of the evidence as set out in *Jackson v. Virginia*. *State v. Green*, 94

Wn.2d 216, 221, 616 P.2d 628 (1980). When reviewing a challenge to the sufficiency of the evidence to prove the elements of an offense, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The purpose of this standard of review is to ensure that the trial court fact finder rationally applied the constitutional standard required by the due process clause of the Fourteenth Amendment to the United States Constitution, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt. *Jackson*, 443 U.S. at 317-18.

In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). These inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Further, we must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The presence of countervailing valuation evidence is irrelevant to a challenge to the sufficiency of evidence because the evidence is viewed in the light most favorable to the State. *State v. Sweany*, 174 Wn.2d 909, 918, 281 P.3d 305 (2012).

The vehicular homicide statute provides that a driver is guilty of vehicular homicide if a person dies within three years as a proximate result of an injury proximately

caused by a driver who operated a motor vehicle: (a) while under the influence of intoxicating liquor or any drug as defined in RCW 46.61; or (b) in a reckless manner; or (c) with disregard for the safety of others. RCW 46.61.520(1), (2). In a vehicular homicide case, the State must prove a causal connection between the defendant's conduct and the resulting death. *State v. Giedd*, 43 Wn. App. 787, 791-92, 719 P.2d 946 (1986).

Jurors are not required to be unanimous on which of the three means the State has proved, provided the alternate means are not repugnant to each other and there is substantial evidence to support each of these means. *State v. Randhawa*, 133 Wn.2d 67, 73-74, 941 P.2d 661 (1997) (vehicular homicide conviction upheld where sufficient evidence of defendant consuming alcohol before speeding and swerving off the road demonstrated both intoxication and reckless prongs). If there is sufficient evidence to support each alternative means submitted to the jury, the conviction will be affirmed because we infer that a rational jury would rest its decision on a unanimous finding as to the means. *Id.*[4]

Mr. Visoso argues that his actions were negligent, not reckless. The term "in a reckless manner" is not defined in either the vehicular homicide statute, RCW 46.61.520,

[4] *See also State v. Barefield* for this premise. 47 Wn. App. 444, 458-60, 735 P.2d 1339 (1987) (the court found sufficient evidence to convict on all three prongs where the defendant caused a collision after crossing over the center line while intoxicated with a blood alcohol level of 0.18 and admitted to drinking beforehand), *aff'd* 110 Wn.2d 728, 756 P.2d 731 1988).

or the vehicular assault statute, RCW 46.61.522, nor is the term defined elsewhere in the motor vehicle code. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). The *Roggenkamp* court re-affirmed the settled definition of "driving in a reckless manner" under the vehicular assault and vehicular homicide statutes as driving in a "rash or heedless manner, indifferent to the consequences." *Id*. at 621-22.[5] Where Mr. Roggenkamp's actions caused the collision, the concurring bad actions of the victim driver did not render the evidence insufficient. *Id*. at 630-31. Mr. Roggenkamp collided with the victim's car after passing into oncoming traffic at more than twice the speed limit. *Id*. at 618. His attempts to brake caused his car to skid into the victim's vehicle. *Id.* n.9. The victim's 1.3 blood alcohol concentration and failure to stop at a stop sign immediately prior to the collision did not mitigate the causation. *Id*. n.9.

Mr. Visoso argues that "driving in a reckless manner" as defined by *Roggenkamp* requires proof of egregious actions that were not present in his case. His argument fails to acknowledge that evidence of consuming alcohol is relevant to show driving in a reckless manner even if the jury does not agree that the defendant was intoxicated. Many of the numerous cases cited by Mr. Visoso actually support the existence of sufficient evidence in the present case. In *State v. Fateley*, the court found sufficient evidence of

[5] The meaning of reckless for the purposes of the vehicular homicide standard is not the same meaning of reckless in the reckless driving statute and the two should not be confused. *Roggenkamp*, 153 Wn.2d at 623.

reckless driving to support a conviction under the former negligent homicide statute where the defendant was intoxicated and drove his motorcycle across the oncoming lane of traffic of a road he was familiar with and no other irregularity existed on the road to explain his driving. 18 Wn. App. 99, 103, 566 P.2d 959 (1977). Notably, evidence of intoxication is relevant to proving reckless driving. *Id*. at n.5; *See also State v. Travis*, 1 Wn. App. 971, 974, 465 P.2d 209 (1970) (evidence that the defendant had been driving was relevant to charge of reckless driving). Here, the jury's lack of unanimity on the intoxication prong does not mean they were precluded from considering evidence of drinking under the reckless prong.

In *State v. Hill*, the defendant's intoxication, and driving the wrong way on the freeway before collision without attempting to avoid other cars, together constituted driving "in a reckless manner" within the meaning of the vehicular assault statute. 48 Wn. App. 344, 348, 739 P.2d 707 (1987). *State v. Baker* involved the former negligent homicide statute RCW 46.56.040.[6] 56 Wn.2d 846, 849, 355 P.2d 806 (1960). In *Baker*, the court held that there was sufficient evidence to support both the intoxication and reckless prongs of the statute where the defendant admitted to drinking, the officer

[6] RCW 46.56.040 was recodified as the current vehicular homicide statute RCW 46.61.520 in 1965. LAWS OF 1965, Ex. Sess., ch. 155, § 92; *State v. Partridge* also dealt with the former negligent homicide statute but "reckless" was not defined by case law at the time of the decision. 47 Wn.2d 640, 645, 289 P.2d 702 (1955) (jury instructions permitting conviction on ordinary negligence for driving in a reckless manner deemed improper and disregard prong not addressed).

testified to Baker's intoxication, and evidence showed the defendant driving at a high rate of speed in a crowded intersection before swerving and striking the victim pedestrian. *Id*. at 861.

In this case, Mr. Visoso admits to driving over 50 m.p.h. on a two-lane road and reaching for his cell phone on the floor. While he claims that he was only "momentarily" distracted, the evidence demonstrates that he had at least 30 seconds to see warning signs and the approaching intersection. On a clear day with no visibility limitations, he blew a stop without slowing or braking, and hit Mr. Nelson's vehicle at full speed. This evidence supports a finding that Mr. Visoso's distraction was more than "momentary." In combination with evidence that he had alcohol in his system, the jury could find that Mr. Visoso was driving in a rash or heedless manner, indifferent to the consequences.

This evidence also supports a conviction under the third prong of the statute: that Mr. Visoso drove a motor vehicle "with disregard for the safety of others." RCW 46.61.520(1)(c). In *State v. Eike*, the court defined the disregard prong of vehicular homicide, distinguishing it from the reckless prong standard. 72 Wn.2d at 762-63. Disregard for the safety of others "implies an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term "'negligence.'" . . . . To drive with disregard for the safety of others, consequently, is a greater and more marked dereliction than ordinary negligence. It does not include the

many minor inadvertences and oversights which might well be deemed ordinary negligence under the statutes." *Id*. at 765-66.

In *State v. Jacobsen*, 78 Wn.2d 491, 498, 477 P.2d 1 (1970), the court found that this standard was not vague and concisely reaffirmed it stating that disregard for safety implies "an aggravated kind of negligence, falling short of recklessness, but more serious than ordinary negligence." *Id*. Later case law clarified the disregard prong. "Some evidence of a defendant's conscious disregard of the danger to others is necessary to support a charge of vehicular homicide." *State v. Vreen*, 99 Wn. App. 662, 994 P.2d 905 (2000) (juror peremptory challenge denial was reversible error and evidence ruling erroneous where victim's relationship to defendant was relevant to "disregard"), *aff'd*, 143 Wn.2d 923, 26 P.3d 236 (2001), *abrogated by Rivera v. Illinois*, 556 U.S. 148, 129 S. Ct.1446, 173 L. Ed. 2d 320 (2009).

In this case, neither party cites any cases involving cell phone distraction. While none exists in Washington, numerous exist in Texas. In *Montgomery v. State*, the court found that evidence was sufficient to support a conviction for criminally negligent homicide where the defendant caused a collision of three vehicles while driving her vehicle on a highway access road at less than 50 miles per hour, and abruptly changed lanes across multiple occupied lanes to enter the highway without signaling or looking while talking on her cell phone. 369 S.W.3d 188, 194 (Tex. Crim. App. 2012). Where the defendant admitted that using the cell phone had distracted her, the court indicated

that she ought to have been aware of the substantial and unjustifiable risk created by her actions. *Id*. The court noted that the State had no burden to show that driving while using a cell phone is always risky or dangerous, or that it, of itself, creates a substantial and unjustifiable risk, only that appellant's use of a cell phone *in this case* created a substantial and unjustifiable risk because it interfered with her ability to maintain a proper lookout for other vehicles. *Id*.

We agree that, under the facts of this case, prolonged distraction by cell phone coupled with alcohol consumption provides sufficient evidence to support a jury finding of more than ordinary evidence. Here, the record clearly supports the facts that Mr. Nelson was killed because Mr. Visoso ran a stop sign at lethal highway speed without slowing or braking in anticipation of the intersection despite plainly visible warning signs. There was evidence that alcohol in his system likely affected his reaction times and awareness of his surroundings. Mr. Visoso admits that he was distracted and should have pulled over before reaching for the phone. His distraction and alcohol consumption posed a great and obvious risk to other drivers on the road and anyone with basic general awareness of safety would have known to avoid such serious failures.

The evidence was sufficient to support Mr. Visoso's conviction for vehicular homicide under the reckless and disregard prong of the statute.

Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Lawrence-Berrey, J.

Pennell, C.J.

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on October 28, 2021, I mailed to the following US Postal Service first-class mail, the postage prepaid or electronically served, by prior agreement between the parties, a true and correct copy of the Petition for Review to the following: Grant County Prosecuting Attorney at gdano@grantcountywa.gov and to Genaro Visoso/DOC#422237, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

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