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COURT OF APPEALS
DIVISION II

NO. 38936-3

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

STATE OF WASHINGTON, RESPONDENT

v.

JOHN NICHOLAS WOODS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John McCarthy, Judge

No. 08-1-00717-2

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Was there sufficient evidence for a jury to find defendant guilty of vehicular homicide where there was sufficient evidence that defendant's actions were the proximate cause of victim Radion Plyut's death and where the victim's actions were at most a concurring cause? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure..... 1

 2. Facts 2

C. ARGUMENT..... 6

 1. THE EVIDENCE AGAINST DEFENDANT WAS SUFFICIENT FOR A JURY TO FIND THAT HE WAS GUILTY OF VEHICULAR HOMICIDE WHERE HIS ACTIONS WERE THE PROXIMATE CAUSE OF THE COLLISION THAT KILLED RADION PLYUT AND MR. PLYUT'S ACTIONS WERE AT MOST A CONCURRENT CAUSE..... 6

D. CONCLUSION..... 12

Table of Authorities

State Cases

<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	7
<i>State v. Gerber</i> , 28 Wn. App. 214, 217, 622 P.2d 888 (1981).....	6
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980)	6
<i>State v. Lubers</i> , 81 Wn. App. 614, 619, 915 P.2d 1157 (1996)	6
<i>State v. Meekins</i> , 125 Wn. App. 390, 396, 105 P.3d 420 (2005).....	7, 8
<i>State v. Rangel-Reyes</i> , 119 Wn. App. 494, 499, 81 P.3d 157 (2003).....	6
<i>State v. Rivas</i> , 126 Wn.2d 443, 451, 896 P.2d 57 (1995)	7
<i>State v. Roggenkamp</i> , 115 Wn. App. 927, 931-933, 64 P.3d 92 (2003)	8, 9, 10, 12
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	8, 9, 10
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	6
<i>State v. Souther</i> , 100 Wn. App. 701, 706, 998 P.2d 350 (2000).....	7, 12
<i>State v. Theroff</i> , 25 Wn. App. 590, 593, 608 P.2d 1254 (1980).....	6

Statutes

RCW 46.61.520(1)	7
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence for a jury to find defendant guilty of vehicular homicide where there was sufficient evidence that defendant's actions were the proximate cause of victim Radion Plyut's death and where the victim's actions were at most a concurring cause?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, John Woods, on February 7, 2008, with one count of vehicular homicide, one count of failure to remain at accident resulting in death, and one count of driving while in suspended or revoked status in the first degree. CP 1-2.

The case was called for trial on January 21, 2009, in front of the Honorable John McCarthy. RP 3. An amended information was filed on the same day. CP 5-7. The only change on the amended information was a change for the degree of suspension from first degree to second degree. CP 5-7, RP 35¹.

The jury found defendant guilty of all three counts. RP 469, CP 81, 83, 84.² They also answered special interrogatories. RP 470, CP 85. The jury found that defendant was under the influence of drugs and alcohol, was reckless and displayed a disregard for the safety of others. RP 470, CP 85.

Sentencing was held on February 27, 2009. 2/27/09 RP 2, CP 144-162. Defendant was determined to have an offender score of three for the purpose of the vehicular homicide, an offender score of seven for the failure to remain charge, and the driving while suspended charge was a gross misdemeanor. CP 144-162. Defendant was sentenced to the high end of the range on both counts, with 133 months on count one, and 116 months on count two to run concurrent. 2/27/09 RP 20, CP 144-157. Defendant received 365 days on the driving while license suspended charge to run concurrent to the 133 months. 2/27/09 RP 21, CP 158-162.

Defendant filed this timely appeal. 2/27/09 RP 25, CP 163.

2. Facts

On February 3, 2008, victim Radion Plyut was killed in an automobile collision on Brookdale road. RP 51-2, 152. Mr. Plyut died of blunt force injuries to the chest and abdomen. RP 345.

¹ The State will refer to the seven sequentially paginated volumes of VRPS as “RP”, and the single non-sequential VRP as “2/27/09 RP.”

² Defendant only challenges his conviction for vehicular homicide.

Chris Partridge lives on Brookdale road. RP 57. Around 11 pm on February 3, 2008, Mr. Partridge heard the distinct sound of a BMW motor, and then a loud crash. RP 60-61. Mr. Partridge, who has experience with different types of vehicles in his line of work, recognized the motor and indicated that the sound the motor was making indicated that the vehicle was going really fast. RP 55-56, 61. Mr. Partridge looked outside and saw the backend of a Mazda Protégé and a BMW. RP 63-4. A person got out of the BMW and hobbled down the road. RP 64.

The person in the Mazda appeared unconscious and was incoherent and could only grunt, groan and make gurgling noises. RP 72-3, 106, 109-110, 120.

Brent Royeton lives off 41st on a cul-de-sac in the neighborhood where the collision occurred. RP 84-5. Mr. Royeton heard a vehicle coming from Canyon with a very loud exhaust. RP 86. The vehicle sounded like it was speeding. RP 86. Mr. Royeton saw the car and said it sounded like it was still gaining speed as it passed him. RP 87. After the “earth-shattering” crash, Mr. Royeton went to the collision scene. RP 86, 89. Mr. Royeton also observed a man get out of the BMW and leave the scene. RP 92.

Thomas Taylor does house sitting and elder care, and was working at a client’s house just off of Brookdale. RP 114-15. He heard the crash and went out to the collision scene. RP 116-17. A man at the scene said he needed to get out of there because he was going to jail. RP 117.

Mr. Partridge described the man running from the BMW to police. RP 69-70. Deputy Condrey responded to the scene and saw a man matching the description of the fleeing driver walking on Brookdale, six to seven blocks from the collision scene. RP 129-130, 148. Deputy Condrey saw blood on the man's hands and blood in his teeth. RP 132-33. The man, later identified as defendant, said he was just out walking around. RP 134. Deputy Condrey could smell an overpowering odor of intoxicants coming from defendant, and observed that his eyes were watery and red. RP 134-5. A mangled car key was found in defendant's right front jacket pocket. RP 139. The key unlocked the steering wheel of the BMW. RP 150. Defendant said he had had three beers, but that he was just walking around and had not been in an accident. RP 140. Defendant later told paramedics, "I was driving and I got into a fucking wreck." RP 151. Mr. Partridge identified defendant as the person he saw leaving the BMW and the scene of the accident. RP 75-6, 198.

Deputy Powers analyzed the collision scene. RP 207. The front end of the BMW contacted with the side of the Mazda. RP 241. The Mazda was turning left. RP 243. Deputy Powers calculations showed the Mazda was traveling at 14mph and the BMW was traveling at 72 mph. RP 249, 257.

Tim Moebes, a defense expert, disputed the findings of Deputy Powers. RP 361. However, Mr. Moebes still had defendant traveling at 60mph. RP 364. Mr. Moebes estimated that the victim had about 4-6

seconds to see the BMW. RP 367-68. However, Mr. Moebes admitted that it was harder to judge the speed of cars at night. RP 381. There was no evidence of avoidance at the scene. RP 385. Mr. Moebes' calculations did not take into account the effects of alcohol and marijuana on defendant. RP 376.

Deputy Johnston met defendant at Madigan hospital. RP 167-9. Deputy Johnston smelled the odor of intoxicants coming from defendant and also noted his red and watery eyes. RP 169. A blood draw was done. RP 178, 276. The results of the blood draw came back with a blood alcohol content of .15 and a THC level of 2.2 nanograms. Brittany Ball testified at trial about the effects of alcohol, the effects of marijuana and the combined effects of both. RP 323-325, 327-329, 330.

While at the hospital, defendant stated, "'Officer, tell the family I am sorry. What was the name of the person? I want to die. I killed someone, I am not okay with what I did. I took someone's life. I took another man's life. I can't believe I killed a man. Tell the family I am sorry. I didn't mean it, didn't mean for it to happen."

"It hurts, but not as bad as my feelings for the family. Now I guess I kill people." RP 185.

C. ARGUMENT.

1. THE EVIDENCE AGAINST DEFENDANT WAS SUFFICIENT FOR A JURY TO FIND THAT HE WAS GUILTY OF VEHICULAR HOMICIDE WHERE HIS ACTIONS WERE THE PROXIMATE CAUSE OF THE COLLISION THAT KILLED RADION PLYUT AND MR. PLYUT'S ACTIONS WERE AT MOST A CONCURRENT CAUSE.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25

Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In a prosecution for vehicular homicide, the only causal connection which the State is required to prove is the connection between the act of driving and the collision. *State v. Rivas*, 126 Wn.2d 443, 451, 896 P.2d 57 (1995). RCW 46.61.520(1) provides:

When the death of any person ensues within three years as a proximate result of injury **proximately caused by the driving** of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle: ... [Emphasis added.]

Generally, this means that “a defendant’s conduct is ‘a proximate cause’ of harm to another if, in direct sequence, unbroken by any new independent causes, it produces the harm, and without it, the harm would not have happened.” *State v. Meekins*, 125 Wn. App. 390, 396, 105 P.3d 420 (2005) [Citations omitted].

The same harm can have more than one proximate cause. *State v. Souther*, 100 Wn. App. 701, 706, 998 P.2d 350 (2000). A defendant’s conduct is not a proximate cause if some other cause is the sole cause. *State v. Meekins*, 125 Wn. App. at 397. A defendant’s conduct is not a proximate cause if, although it otherwise might have been a proximate cause, a superceding cause intervenes. *Meekins*, at 397-398. The Court

of Appeals in *Meekins* defined superceding cause and intervening force according to both the Washington Courts and the Restatement:

Superceding cause: “A superceding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.” *Meekins* at 398.

Intervening force: “An intervening force is one which actively operates in producing harm to another after the actor’s negligent act or omission has been committed.” *Id.*

In *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005), the Washington Supreme Court held that the victim’s actions were at most a concurrent cause and not a superceding cause. Roggenkamp was driving at 70 MPH in a 35 MPH zone down a residential country road lined with mailboxes and driveways. *State v. Roggenkamp*, 115 Wn. App. 927, 931-933, 64 P.3d 92 (2003). He was following a friend who was in the vehicle in front of him. *Id.* at 932-33. The defendant was traveling in the wrong lane, passing his friend, going twice the speed limit. *Id.* at 933. The victim vehicle, driven by JoAnn Carpenter, had stopped at the stop sign at a cross street and was entering the intersection, turning left in front of the defendant. *Id.* at 932-33. The defendant slammed on his brakes to avoid the Carpenter vehicle. *Id.* at 933. The defendant skidded into the Carpenter vehicle, seriously injuring three people and instantly killing Carpenter’s son. *Id.* It was later determined that Carpenter had a blood

alcohol level of 0.13. *Id.* at 931-934. Roggenkamp argued to the Court of Appeals and Supreme Court, among other things, that the evidence was insufficient to convict him because the actions of the other driver (0.13 blood alcohol concentration and pulling out in front of him) were the superceding cause of the collision. ***Roggenkamp***, 153 Wn.2d at 619, ***Roggenkamp***, 115 Wn. App. at 942.

In upholding Roggenkamp's conviction, the Court of Appeals reasoned that the actions of the victim were not a superceding cause of the collision. An intervening cause is a force that occurs after the defendant has committed the act or omission. ***Roggenkamp***, 115 Wn. App. at 945. The defendant's reckless driving and exceeding the speed limit by double, was ongoing at the time that the victim pulled out into the intersection. *Id.* at 947. The Court further stated:

To be a superceding cause sufficient to relieve a defendant from liability, an intervening act must be one that is not reasonably foreseeable. Factors to consider in determining whether an intervening act is a superseding cause include whether (1) the intervening act created a different type of harm; (2) the intervening act constituted an extraordinary act; and (3) the intervening act operated independently. Thus, when the intervening act is one which the defendant should not have anticipated as reasonably likely to happen, then there is a break in the causal connection between the defendant's negligence and the plaintiff's injury, and the intervening act is the superseding cause of the plaintiff's injury.

Id. at 945-946 [Footnotes omitted.] The Court of Appeals in ***Roggenkamp*** reasoned that the existence of the intersection, the presence of mailboxes

and driveways, and the posted speed limit of 35 MPH should have made it reasonably foreseeable to Roggenkamp that vehicles may be turning onto that road. *Id.* at 946. A vehicle pulling out (whether driven by an intoxicated driver or not) was an occurrence that should have been reasonably foreseeable to Roggenkamp. *Id.* The Court of Appeals concluded that the victim's actions "are not, therefore a superseding cause that became the sole proximate cause of the accident for purposes of Roggenkamp's culpability under the vehicular homicide statute." *Id.* The Court of Appeals concluded: "At most, [the victim's] actions were a concurring cause, not a superseding cause, of the accident. A concurring, as opposed to intervening, cause does not shield a defendant from vehicular homicide." *Id.* at 947.

The Supreme Court upheld the reasoning of the Court of Appeals and their conclusion that Roggenkamp was the proximate cause of the collision. *Roggenkamp*, 153 Wn.2d at 630-631.

Defendant only challenges one element of the five needed to find the defendant guilty of vehicular homicide. *See* CP 50-77, Instruction 14. Defendant only challenges element 2: that the defendant's driving proximately caused injury to another person. CP 50-77, Instruction 14. The State presented sufficient evidence that defendant was the proximate cause of the collision that killed Mr. Radion Plyut.

The jury was instructed on the issue of proximate cause:

If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death, it is not a defense that the driving of the deceased may also have been a proximate cause of the death.

However, if a proximate cause of the death was a new independent intervening act of the deceased which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's act has been committed.

However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant should have reasonably anticipated.

CP 50-77, Instruction 12.

In the instant case, the facts are extremely similar to *Roggenkamp*. Brookdale road was a two lane, rural country road. RP 61-62. The posted speed limit is 35 mph. RP 62. Mr. Plyut lived just off of Brookdale. RP 51. The area is residential. RP 57, 84-5, 114-15. While the victim in the instant case made a left hand turn in front of defendant, there was no evidence that Mr. Plyut was drinking as had the victim in *Roggenkamp*. RP 243.

It was reasonably foreseeable on a residential road with a speed limit of 35mph that vehicles would make turns into driveways or side

streets. In addition, the victim turning was not an event that happened after the defendant's act. *See Roggenkamp*, 115 Wn. App. at 947. Defendant's reckless driving in driving in excess of the speed limit and while intoxicated was ongoing at the time Mr. Plyut attempted to make his turn. As in *Roggenkamp*, the victim's actions were at most a concurrent cause of the accident. As such, "a concurring, as opposed to an intervening cause, does not shield a defendant from vehicular homicide." *Roggenkamp*, 115 Wn. App. at 947, *Souther*, 100 Wn. App. at 710-11.

Further, because the State met their burden of proving beyond a reasonable doubt that defendant was the proximate cause of the collision that killed Mr. Plyut, the State necessarily proved that defendant's actions were not broken by any new and independent cause. *See Roggenkamp*, 115 Wn. App. at 948. The victim's actions were not a superseding or intervening event. The State proved that defendant's actions were the proximate cause of Mr. Plyut's death.

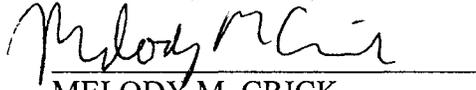
The State presented sufficient evidence that defendant was the proximate cause of the collision. Defendant's conviction should be upheld.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions and sentence below.

DATED: November 30, 2009.

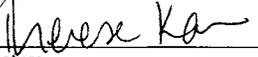
MARK LINDQUIST
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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