

NO. 46592-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RYAN LEVI MATISON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge
The Honorable Suzan Clark, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR.....1

1. The trial court’s refusal to sever the reckless driving charge from the vehicular homicide charge denied Matison a fair trial.....1

2. Defense counsel’s failure to propose a limiting instruction telling the jury the limits of the allegations on the reckless driving charge deprived Matison adequate representation.....1

3. The prosecutor committed flagrant and reversible misconduct in rebuttal argument in telling the jury it was their job to hold Matison accountable for Samantha’s Effingham’s death.....1

4. The felony and misdemeanor judgments and sentences do not adequately clarify the court’s intent that the sentences be served concurrently.....1

5. The trial court failed to enter written findings of fact and conclusions of law after the suppression hearing as required by CrR 3.5(c).....1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

1. Whether the trial court abused its discretion and deprived Matison a fair trial by refusing to sever the reckless driving charge from the vehicular homicide charge?.....1

2. Whether defense counsel’s failure to propose a limiting instruction telling the jury the evidentiary limits of the reckless driving charge deprived Matison adequate representation and a fair trial?.....1

3. Whether the prosecutor committed flagrant and reversible misconduct in rebuttal argument by telling the jury it was their job

| | |
|---|----|
| to hold Matison accountable for Samantha’s Effingham’s death?..... | 2 |
| 4. Whether the felony and misdemeanor judgments and sentences do not adequately clarify the court’s intent that the sentences be served concurrently..... | 2 |
| 5. Whether the trial court failed to enter written findings of fact and conclusions of law after the suppression hearing as required by CrR 3.5(c)?..... | 2 |
| C. STATEMENT OF THE CASE..... | 2 |
| 1. <u>Counts and convictions</u> | 2 |
| 2. <u>CrR 3.5 hearing and hearing and motion to admit ER 404(b) evidence</u> | 3 |
| 3. <u>Motion and Answer to Request for Bill of Particulars</u> | 4 |
| 4. <u>Motion to Sever Counts</u> | 5 |
| 5. <u>Trial Testimony</u> | 7 |
| a. <u>Count 2 – Reckless Driving</u> | 7 |
| b. <u>Count 1 – Vehicular Homicide</u> | 8 |
| 6. <u>Jury Instructions</u> | 13 |
| 7. <u>Closing argument</u> | 14 |
| 8. <u>Sentencing</u> | 15 |

| | | |
|----|--|----|
| D. | ARGUMENT..... | 17 |
| 1. | THE TRIAL COURT’S REFUSAL TO SEVER THE RECKLESS DRIVING FROM THE VEHICULAR HOMICIDE DEPRIVED MATISON A FAIR TRIAL.... | 17 |
| 2. | DEFENSE COUNSEL’S FAILURE TO PROPOSE AN INSTRUCTION LIMITING THE EVIDENCE OF RECKLESS DRIVING TO WHAT THE HELDS OBSERVED DEPRIVED MATISON EFFECTIVE COUNSEL..... | 22 |
| 3. | PROSECUTORIAL MISCONDUCT IN REBUTTAL CLOSING ARGUMENT DEPRIVED MATISON HIS RIGHT TO A FAIR TRIAL..... | 24 |
| 4. | THE FELONY AND MISDEMEANOR JUDGMENTS AND SENTENCES SHOULD BE REMANDED FOR CORRECTION TO REFLECT THE CONCURRENT SENTENCES ORDERED BY THE COURT..... | 28 |
| 5. | THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PER CrR 3.5(c)..... | 30 |
| E. | CONCLUSION..... | 32 |
| | CERTIFICATE OF SERVICE..... | 33 |

TABLE OF AUTHORITIES

| | Page |
|--|--------|
| Cases | |
| <i>Berger v. United States</i> , 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) | 24 |
| <i>Estelle v. Williams</i> , 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) | 24 |
| <i>Ferree v. Doric Co.</i> , 62 Wn.2d 561, 383 P.2d 900 (1963) | 31 |
| <i>In re Glasmann</i> , 175 Wn. 2d 696, 286 P.3d 673 (2012)..... | 25 |
| <i>Presidential Estates Apartment Assoc. v. Barrett</i> , 129 Wn.2d 320, 917 P.2d 100 (1996)..... | 29 |
| <i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988) | 27 |
| <i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899 (2005)..... | 24 |
| <i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002) | 26 |
| <i>State v. Bythrow</i> , 114 Wn.2d 713, 790 P.2d 154 (1990)..... | 17, 18 |
| <i>State v. Casteneda–Perez</i> , 61 Wn. App. 354, 810 P.2d 74, <i>review denied</i> , 118 Wn.2d 1007 (1991)..... | 27 |
| <i>State v. Charlton</i> , 90 Wn.2d 657, 585 P.2d 142 (1978)..... | 24 |
| <i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984)..... | 24 |
| <i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003) | 26 |
| <i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009)..... | 25 |
| <i>State v. Harris</i> , 36 Wn. App. 746, 677 P.2d 202 (1984)..... | 22 |

| | |
|---|--------|
| <i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998) | 31, 32 |
| <i>State v. Markle</i> , 118 Wn.2d 424, 823 P.2d 1101 (1992)..... | 18 |
| <i>State v. Maurer</i> , 34 Wn. App. 573, 663 P.2d 152 (1983)..... | 18 |
| <i>State v. McDaniel</i> , 155 Wn. App. 829, 230 P.3d 245, <i>review denied</i> , 169 Wn.2d 1027 (2010)..... | 21 |
| <i>State v. McFarland</i> , 127 Wn. 2d 322, 899 P.2d 1251 (1995)..... | 23 |
| <i>State v. Medina</i> , 112 Wn. App. 40, 48 P.3d 1005, <i>review denied</i> , 147 Wn.2d 1027 (2002)..... | 17 |
| <i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011)..... | 24 |
| <i>State v. Perez-Mejia</i> , 134 Wn. App. 907, 143 P.3d 838 (2006) | 26 |
| <i>State v. Randhawa</i> , 133 Wn. 2d 67, 941 P.2d 661 (1997)..... | 19 |
| <i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)..... | 23 |
| <i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994)..... | 25, 26 |
| <i>State v. Smith</i> , 68 Wn. App. 201, 842 P.2d 494 (1992)..... | 31 |
| <i>State v. Snapp</i> , 119 Wn. App. 614, 82 P.3d 252, <i>review denied</i> , 152 Wn.2d 1028 (2004)..... | 29, 30 |
| <i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009)..... | 18 |
| <i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011) | 26 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... | 23 |

Statutes

| | |
|-----------------------|-------|
| RCW 46.61.500(1)..... | 2, 19 |
|-----------------------|-------|

RCW 46.61.520(1)(b).....2

Other Authorities

CrR 3.5 3, 30, 32

CrR 3.5(c) 1, 30, 31, 32

CrR 4.3(a) 17

CrR 4.3(e) 17

CrR 4.4(b) 17

CrR 7.8(a). 29

ER 404(b)..... 3, 4, 6

Sixth and Fourteenth Amendments to the United States Constitution 23

U.S. Const. Amend VI..... 23

Wash Const. Art. 1 § 22..... 23, 24

A. ASSIGNMENTS OF ERROR

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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C. STATEMENT OF THE CASE

1. Counts and convictions

The Clark County Prosecutor charged Ryan Levi Matison with Vehicular Homicide (Operating in a Reckless Manner)¹ and Reckless Driving.² CP 1-2,³ 3-4.⁴ A jury found Matison guilty as charged. CP 3-4, 5, 6.

¹ Count 1, RCW 46.61.520(1)(b)

² Count 2, RCW 46.61.500(1)

³ Original Information

⁴ Amended Information correcting last name of deceased to "Effingham."

2. CrR 3.5 hearing and motion to admit ER 404(b) evidence

On January 24, 2014, the trial court heard a CrR 3.5 confession hearing and the State's motion to admit prior instances of Matison's driving under ER 404(b). RP 1⁵ 21-35.

The State presented no testimony at the CrR 3.5 hearing. Instead, with Matison's approval, the court reviewed the State's summary of its anticipated testimony provided in the State's written motion arguing for admission of Matison's statements. RP 1 21-25. The parties also discussed pertinent facts in their argument to the court. RP 1 28-32.

In summary, two weeks after the accident that led to Matison's charges, Washington State Patrol detectives contacted Matison and asked him to come to their office for an interview. RP 1 29. Matison, who was not under arrest or charged with a crime, came to the office and was interviewed. RP 1 29. The detectives advised Matison of his Miranda rights verbally and in writing. RP 1 29. Matison ostensibly waived his rights and gave a taped statement. RP 1 29

Matison argued the process of taking his statement was unduly coercive and made his statement inadmissible. Matison questioned whether, regardless of Miranda warnings, a person lead into an interview room by police and not assured he could really leave at any time, could

⁵ There are multiple volumes of verbatim. The specific volume where the page cite is found is provided after each "RP."

give an uncoerced statement. RP 1 31-32. Matison chose not to testify at the hearing. RP 1 25-27.

The court held Matison made a voluntary, intelligent, and knowing waiver of his rights and his statement was admissible. RP 1 33-34. The prosecutor assured the court he would prepare and offer written findings of fact and conclusions of law. RP 1 34-35. To date, none is filed.

After ruling on the admissibility of Matison's statement, the court turned its attention to the State's request that certain alleged instances of Matison's driving be held admissible under ER 404(b). RP 1 42-58. The State sought admission of (1) two speeding tickets and (2) specific instances of Matison's driving as described by Matison's friends and acquaintances who witnessed the driving. RP 1 43-44. The court excluded the speeding tickets as inadmissible propensity evidence. RP 1 58. After additional consideration at a later hearing, the court also excluded the specific instances of driving. RP 1 94-109.

3. Motion and Answer to Request for Bill of Particulars

Matison requested a Bill of Particulars on both charges. Supplemental Designation of Clerk's Papers, Motion for Bill of Particulars (sub. nom. 7). The State responded to the request by giving an offer of proof at the January 24 hearing. The prosecutor limited the Count 2 reckless driving to "the initial portion of passing the Helds." RP 1 40.

Specifically, on the afternoon of November 23, 2012, Jeff and Sarrah Held and their two children were driving on Northeast 29th which is a two lane road. They live nearby and are very familiar with the road. RP 1 37-38. Jeff Held, in his rearview mirror, saw a car coming up fast. He braced for a potential collision but the car swung around him and into the opposite lane. RP1 38. The car straddled the two lanes, which included an area of double-yellow lines, for a short distance until it crested a short hill and went out of the Helds' view. RP1 38-39. The speed limit on the road is 40 miles per hour. RP1 37. Jeff, who was driving 50 miles per hour, estimated the car's speed at 60 to 70 miles per hour. RP 1 37-38. The Vehicular Homicide was failing to stop at a stop sign further up the same road with the consequence of a collision and the immediate death of his passenger, Samantha Effingham. RP 1 40.

4. Motion to Sever Counts

Matison moved to sever the reckless driving charge from the vehicular homicide charge. Supp. DCP, Motion and Memorandum to Sever Counts (sub. nom. 56). The court heard the motion on February 25, 2014. RP 1 82-109. Matison argued he could not be tried fairly on either count unless they were severed. The evidence of the two separate, distinct acts - passing the Helds and the accident resulting in Effingham's death - were not cross-admissible. He likened the facts the State would argue to

support the reckless driving as tantamount to inadmissible ER 404(b) propensity evidence in the vehicular homicide. Supp. DCP, Motion and Memorandum to Sever Counts; RP 1 83. Matison was concerned too, that the jury would infer a criminal disposition cumulating in guilt, when, if tried separately, a jury would not do so. RP1 83, 87. He also cited the weak facts to support findings of guilt if tried alone and the confusion if tried together. RP1 88-89. The State argued Matison's driving leading up to the accident was admissible to show his reckless state of mind before the accident. RP 1 93. The court refuse to sever the charges.

I think these two incidents are so intimately connected that they are cross-admissible as evidence of each -- the crime -- one crime against the other. And they're such that even -- but after I've heard all the evidence, it may be a merger or same criminal conduct issue if -- if the jury were to find guilt on both charges. But I'm going to deny severance and rule that the -- the evidence of the reckless driving is admissible against the vehicular homicide case, and the reverse is also true in that it goes -- because they're so closely associated in time, they're -- would come in under 404(b) in any event.

RP 1 94.

Matison renewed his severance motion though a written motion in limine heard on the first day of trial prior to the presentation of evidence. Supp DCP, Defendant's Pretrial Motions (sub. nom. 108). RP 2 202. The court again declined to sever the charges. RP 2 202.

5. Trial testimony

a. Count 2 – Reckless Driving

The Helds live off Northeast 29th Avenue in Ridgefield. Early afternoon on November 23, 2012, the day after Thanksgiving, they headed out for Black Friday shopping. RP 2 243; RP 3A 401. Jeff drove their Dodge Ram pickup and Sarrah sat next to him. RP 3A 399-400. The two Held children were in the backseat. RP 3A 400. It was raining. RP 2 252; RP 3A 401. State Route 502 is about a mile south from where the Helds' driveway connects with 29th. RP 3A 403.

The Helds drove southbound on 29th toward the intersection with SR 502. RP 2 244. They were on 29th just briefly when Jeff surprised Sarrah by saying "oh shit." RP 2 245. A Toyota Corolla swerved fast around the driver's side of the Helds' pickup. RP 2 248. The Helds watched the car for a few moments until it passed out of sight after cresting a small hill. RP 2 249-51. After passing the Helds, the car straddled the centerline on the two-lane road and was still straddling the lanes going over the small hill. RP 2 250-51; RP 3A 406. Per Jeff, a driver could see "pretty far" ahead when cresting the hill. RP 3A 442. There were double yellow lines marking a no-passing zone on the road going over the hill. RP 3A 443.

Jeff had seen the Toyota in his rearview mirror. RP 3A 404. He noticed it was coming fast. RP 3A 404. Fearing the car would hit him, he clutched the steering wheel and braced for an impact. RP 3A 404-05. Instead, the car “flew” past him and passed him “like [he] was standing still.” RP 3A 408, 429. The speed limit was 40 miles per hour and Jeff was driving 45 to 50 miles per hour. RP 3A 441. He estimated the car’s speed at 15-20 miles per hour faster than he was traveling. RP 3A 408, 429.

Neither of the Hells used their cell phones to call the police and report what happened. RP 2 279.

b. Count 1 – Vehicular Homicide

Jeff sped up and continued to the intersection with SR 502. He felt the car would probably not have time to stop at the intersection given its speed. RP 3A 414. A flashing stop sign warns drivers on 29th to stop at the intersection with SR 502.⁶ At the intersection, the Hells saw both the car and a full-sized pickup in a field across from the intersection. RP 3A 416-18. Jeff used his cell phone to call 911 and report the accident. RP 3A 416.

Minutes before, Luke Merriman was driving his Silverado two-ton pickup east on SR 502. RP 3B 462. He had the right of way and was

⁶ No one testified the stop sign was working on that day.

passing by the intersection with 29th when he felt an impact. RP 3B 466. His airbag deployed. RP 3B 466. His truck settled in a nearby field. RP 3B 466. He did not remember seeing the car prior to impact. RP 3B 467. It was apparent he struck the car and that both vehicles were totaled. RP 3B 468.

The driver of the car, Matison, got out of the car and said his brakes had not worked. RP 3B 468. Matison seemed young and scared. RP 3B 468. Merriman did not otherwise interact with Matison. RP 3B 469. Instead, he waited for the police and medical assistance to arrive. RP 3B 469-70. Merriman assumed Matison did not stop for the stop sign and collided with his truck. RP 3B 471. Per Merriman's airbag module, his truck was going 53 or 54 miles when it collided with the car. RP 3B 487. Merriman's injury was limited to whiplash. RP 3B 470.

Forrest Anglemeyer was driving ahead of Merriman on SR 502. RP 3A 300. Traffic was light. RP 3A 310. SR 502 is a two lane road at the point. RP 3A 301. He saw the two vehicles collide in his rearview mirror. RP 3A 303. He did not see the car prior to the collision. He called 911 and went to check on the occupants. RP 3A 306-07. He noticed the passenger side of the car was pushed in halfway. RP 3A 309. He saw Effingham lying in the vehicle. RP 3A 309. Two men were attending to her. He heard them say she had no pulse. RP 3A 310.

Anglemyer spoke with Matison. Matison told him, “I hit my brakes and I hit my brakes, and I even tried my emergency brake, and that didn’t work.” RP 3A 319. Matison was crying and seemed shaken and upset and concerned about Effingham. RP 3A 320.

Effingham died at the scene of multiple blunt force trauma injuries. RP 2 219. The force of the collision severed her aorta; she lost consciousness in seconds. RP 2 220.

No in-life photos of Effingham were offered as evidence at trial. The jury’s only visual association with Effingham were autopsy photos. RP 2 222-35.

State Patrol responded to the scene to investigate the accident. RP RP 3A 342-43; RP 3B 493, 542. They impounded both vehicles and took them to a secure facility. RP 3B 499.

During their interview with Matison two weeks later, detectives learned Effingham had been Matison’s girlfriend for two weeks. RP 4A 652. That day, they had extra time before Effingham was due to be at work in Woodland so they drove around on Battleground’s back roads. RP 4A 650. Matison had always lived in Battleground and was familiar with the roads and had been at the intersection of 29th and SR 502. RP 4A 646-47. He did not remember passing the Heds. RP 4A 663. He was driving 40-45 miles an hour and had seen the stop sign and thought he had

time to stop. RP 4A 647, 662. He intended to stop at the stop sign. RP 4A 672. He hit his brakes and it felt like they pushed all the way to the floor. RP 4A 660. His car traveled into the intersection where it was hit by Merriman's truck. RP 6A 661.

Because it was an accident, he did not feel guilty about Effingham's death. RP 6A 671. He did not know what, if any, consequence he should suffer because of the accident. RP 6A 667-68. It was truly an accident. RP 6A 671.

Matison testified. He had never been on that side of the at 29th and SR 502 intersection although he knew all the intersections with SR 502 were controlled by a light or a stop sign. RP 4B 759-760. He was driving at about 45 miles per hour when he saw the stop sign. RP 4B 762-63. It was not flashing. RP 4B 761. The stop sign caught him off guard because it came up on him quickly. RP 4B 761. He did not run the stop sign intentionally. RP 4B 763. He expected his brakes to work but they did not. RP 4B 762. He immediately panicked and was scared. RP 4B 763. His car hit the truck. RP 4B 764. He briefly lost consciousness. RP 4B 764. He was devastated by the accident. RP 4B 764. He feels sorry that it happened and feels some responsibility for it. RP 4B 770, 776.

Matison hired mechanical engineer Tom Fries to investigate the condition of the car's brakes during the accident. RP 4B 778. Fries

inspected the brakes and discovered a fluid leak in the left rear brake. RP 4B 793. The leak would cause no problem when braking normally. RP 4B 799. But in braking hard as Matison had done, the brake would feel like it went to the floor. RP 4B 799. Although Matison's brakes technically still worked, albeit at a reduced capability, had Matison known to truly push the brake to the floor, the front brakes likely would have engaged. RP 4B 799-801.

The State Patrol had mechanic Dwayne Jacox inspect Matison's brakes. RP 4B 574-76. Although he found seepage in the left rear wheel cylinder, he felt it was inconsequential. RP 4B 593-94. He believed the brakes were in good condition and were fully functional at the time of the accident. RP 4B 591.

Both the State Patrol and Fries prepared estimates of how fast the car was likely traveling when it collided with the truck. The State Patrol calculated the speed at between 58.76-64 miles per hour. RP 4A 716-17. Fries believed it was likely 45-53 miles per hour. RP 5A 846. No skid marks were detected in the intersection. RP 3A 391. A cautionary sign posted on southbound 29th alerted drivers there was a stop sign 480 feet ahead. RP 3A 352. State Patrol estimated a person driving south on 29th could see the white stop line on the road near the stop sign 350 feet before the line. RP 4A 685-86. State Patrol did additional calculations and

determined if a driver applied his brakes when the stop line first became visible, a car traveling 40 miles an hour should have been able to stop before the stop line. If the car was traveling 60 miles an hour, it might have continued into the intersection without stopping. RP 4A 728.

6. Jury Instructions

The court instructed the jury in Instruction 3 they must decide each count separately.

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.

Supp. DCP, Court's Instructions to the Jury (sub. nom. 117).

The court did not instruct the jury that the evidence presented to support the reckless driving charge was limited to passing the Helds and driving up the road and out of their sight. No one proposed such an instruction. Supp DCP, State's Proposed Instructions (sub. nom 113); Supp DCP, Defendant's Proposed Instructions (sub. nom. 114).

The court instructed the jury in Instruction 11 that to find Matison guilty of reckless driving, it had to find he drove in "willful or wanton disregard for the safety of persons or property."

Instruction 12 provided the legal definition of those terms.

Willful means acting intentionally and purposefully and not accidentally or inadvertently.

Wanton means acting intentionally in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, harm a person or property.

Instruction 7 told the jury that vehicular homicide required a person drive in a reckless manner. Supp. DCP, Instruction 7. The court also instructed,

To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.

Supp. DCP, Instruction 8.

7. Closing argument

Matison defended the case by arguing he did not drive recklessly when he passed the Hells. RP 5B 1021-26. He denied criminal culpability under the reckless standard for the accident. RP 5B 1026-35. The State argued Matison drove recklessly in passing the Hells and that Matison's speed caused the accident because it did not give him time to stop at the stop sign. RP 5B 993-1019, 1035-38.

Twice in closing argument, the prosecutor made sympathetic references to Effingham. In the first instance, he talked about how Effingham's "beautiful life" was cut short by Matison's actions. RP 5B 993. In the second instance, everyone in the courtroom was invited to be

reflective about Matison's conduct because "as a result we lost a beautiful life." RP 5B 1008. Defense counsel did not object.

The prosecutor left the jury with this sentiment at the end of his rebuttal.

[The] person who took [Samantha Effingham's] life, should be held accountable. Do your job. Thank you.

RP 5B 1,038.

Defense counsel again did not object. RP 5B 1,039.

8. Sentencing

At sentencing, the State reiterated its theory consistent with its answer to the Bill of Particulars that the reckless driving was limited to the passing of the Helds. RP 5B 1050. As such, it was a separate and distinct crime from the vehicular homicide and should count as a current offense in calculating Matison's offender score. RP 5B 1050. With an offender score of 1, Matison's standard sentencing range was 26-34 months. RP 1052, 1060. With an offender score of 0, his standard range was 21-27 months. RP 5B 1063.

Matison argued, as tried, the reckless driving and the vehicular homicide were same criminal conduct. RP 5B 1062-64. Accordingly, the reckless driving could not be a point in calculating Matison's offender score. RP 5B 1063-64. Matison also argued that if the court used the

reckless driving conviction to increase the offender score, running the two sentences consecutively would be double jeopardy. RP 5B 1064.

The court held the reckless driving and the vehicular homicide were separate offenses because there was a “sufficient break in timing” to make them separate offenses. RP 5B 1069. The court used the scoring point for the reckless driving to increase Matison’s offender score to 1. RP 5B 1069. The court agreed though that because the reckless driving was used to increase Matison’s offender score, the two sentences should be served concurrently. RP 5B 1069.

The court imposed a 34-month sentence on the vehicular homicide with an additional 18 months of community custody. RP 5B 1069; CP 19. The court imposed 364 days on the reckless driving and suspended all of it and added 24 months of probation. RP 5B 1069; CP 8. Neither the felony nor the misdemeanor judgments and sentences specify the two sentences are concurrent sentences. CP 7-15, 16-28.

Matison made a timely appeal of all portions of his judgments and sentences. CP 29-52.

D. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO SEVER THE RECKLESS DRIVING FROM THE VEHICULAR HOMICIDE DEPRIVED MATISON A FAIR TRIAL.

The trial court committed reversible error in refusing to sever the reckless driving from the vehicular homicide. The error deprived Matison a fair trial. His reckless driving conviction should be reversed.

CrR 4.3(a) permits two or more offenses, whether felonies or misdemeanors or both, to be joined in one information when the offenses are (1) of the same or similar character, even if not part of a single scheme or plan, or (2) based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Improper joinder of offenses or defendants shall not preclude subsequent prosecution on the same charge for the charge improperly joined. CrR 4.3(e).

Offenses properly joined under CrR 4.3(a) should be severed if “the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.” CrR 4.4(b). This is true even though Washington law disfavors separate trials. *State v. Medina*, 112 Wn. App. 40, 52, 48 P.3d 1005, review denied, 147 Wn.2d 1027 (2002). The failure of the trial court to sever counts is reversible upon a showing that the court's decision was a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

A defendant seeking severance must demonstrate that a trial involving multiple counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *Id.* at 718.

Four factors mitigate the prejudice of joinder to the defendant, none of which is dispositive: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses on each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *State v. Sutherby*, 165 Wn.2d 870, 884–85, 204 P.3d 916 (2009). Regarding the fourth factor, the trial court need not sever counts just because evidence is not cross-admissible. *State v. Markle*, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992).

Here, the trial court's refusal to sever the reckless driving from the vehicular homicide denied Matison a fair trial on the reckless driving charge. None of the above four factors mitigate the harm done by joining the reckless driving and the vehicular homicide for trial.

First, the evidence of the reckless driving was weak. The State, by its response to the Bill of Particulars, limited the evidence of the reckless driving to just what the Hells saw before they lost sight of Matison. RP1 140. *State v. Maurer*, 34 Wn. App. 573, 578, 663 P.2d 152, 155 (1983) (bill of particulars limits the prosecutor's proof to the particular matters

specified in the bill). Had the reckless driving been tried alone, a jury would only have heard that Matison passed the Helds on a quiet two-lane road on a rainy November afternoon when no pedestrians or other cars were present. RP 2 240-54; 3A 399-411. Matison drove 15-20 miles an hour over Mr. Held's speed of 50 miles per hour in a 40 mile per hour zone. RP 3A 407-08. Matison then straddled the two lanes for a short distance until he passed out of sight over a small hill where the lanes were marked with double-yellow no-passing lines. RP 2 246-53; RP 3A 408-11. The sight distance in cresting the hill was not restricted. RP 3A 442.

Jeff Held was taken by surprise when he saw Matison coming up on him from behind but he was not so concerned that he thought to call 911 and report what he saw. RP 2 279. Reckless driving requires proof of driving with willful or wanton disregard for the safety of persons or property. RCW 46.61.500(1). Speed alone does not prove reckless driving. *State v. Randhawa*, 133 Wn. 2d 67, 77-78, 941 P.2d 661 (1997).

Had the jury been instructed that the proof of reckless driving was limited only to the driving seen by the Helds, and the jury could overlook the facts of the vehicular homicide, it is unlikely they would have convicted Matison of reckless driving. Instead, because of the failure to sever counts, the jury factored in the irrelevant but highly prejudicial vehicular homicide where Matison failed to stop at a stop sign, careened

onto a state highway, and was t-boned on the passenger side by a full-speed, full-sized pickup, causing the immediate and tragic death of Matison's 17-year old girlfriend and passenger, Samantha Effingham.

Second, the lack of clarity in defenses, that Matison did not drive recklessly and that the vehicular homicide was a tragic accident, favored severance. As argued above, the jury was not told to specifically limit the reckless driving facts only to what the Hells saw before Matison drove over the hill and out of their sight. The jury was left to apply a general denial defense to all the driving and not just the facts of the actual reckless driving charge.

Third, the court's instructions to the jury did nothing to illuminate limitations on the jury's consideration of the evidence. While the court instructed the jury it must decide each count separately, and their verdict on one count should not control their verdict on another count,⁷ the court never instructed the jury that on the count of reckless driving, the evidence of reckless driving was limited to Matison passing the Hells and driving out of their sight over the small hill.

Fourth, the evidence of all of Matison's driving was only cross-admissible on the vehicular homicide charge. Matison was guilty of vehicular homicide if a jury found he drove in a reckless manner and

⁷ Supp. DCP, Court's Instructions to the Jury (Instruction 3)

thereby proximately caused the death of Effingham. The court instructed the jury that “reckless driving” for vehicular homicide meant driving in a rash or heedless manner, indifferent to the consequences. Supp. DCP, Court’s Instructions to the Jury (Instructions 7 and 8). Under that definition, all of Matison’s driving leading up to the collision was relevant to the vehicular homicide. The trial court was correct when it held the evidence of the vehicular homicide driving was cross-admissible with the evidence of the separate reckless driving charge. RP 1 94.

However, the reverse is not true. Given the State’s answer to the Bill of Particulars limiting the reckless driving charge to the Helds’ observations of Matison only until he crested the hill, the vehicular homicide had no bearing on the proof of the reckless driving. The definition of reckless driving as applied to that charge means driving in a willful or wanton disregard for the safety of persons or property. The persons and property put at risk were those put at risk by Matison’s alleged reckless driving as witnessed by the Helds as per the State’s response to the Bill of Particulars.

Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245, *review denied*, 169 Wn.2d 1027 (2010).

The admission of the separate facts of running the stop sign, the collision, and the death of Effingham were used by the jury to improperly infer Matison's guilt on the reckless driving. The jury could not be expected to do otherwise when no one told them the limits put on the evidence of reckless driving as specified by the State's in its response to the Bill of Particulars.

Joinder must not be utilized in such a way as to prejudice a defendant. *State v. Harris*, 36 Wn. App. 746, 749-50, 677 P.2d 202, 204 (1984). Given the State's self-imposed strict limits on the evidence relevant to prove the reckless driving charge, the joining of the after-the-fact facts germane only to the vehicular homicide served only to prejudice Matison. His reckless driving conviction must be reversed and remanded for retrial.

2. DEFENSE COUNSEL'S FAILURE TO PROPOSE AN INSTRUCTION LIMITING THE EVIDENCE OF RECKLESS DRIVING TO WHAT THE HELDS OBSERVED DEPRIVED MATISON EFFECTIVE COUNSEL.

To the extent defense contributed to the error articulated in Issue 1 by failing to propose an instruction limiting the proof of the reckless driving to only what the Helds saw before Matison disappeared from their view, Matison received ineffective assistance of counsel.

The federal and state constitutions guarantee the right of effective representation. U.S. Const. Amend VI; Wash. Const. Art. 1 § 22. To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That the deficient performance resulted in prejudice is established if there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Reasonable tactical decisions and actions by counsel are excluded as a basis for ineffective assistance claims. *State v. McFarland*, 127 Wn. 2d 322, 335-36, 899 P.2d 1251, 1257 (1995). As evidenced by defense counsel's request to have the two offenses severed for trial, there was nothing tactical to be gained by failing to propose a limiting instruction. As specified in the State's Bill of Particulars, the evidence of the reckless driving charge was limited to what the Hells saw. For Matison to have any chance of a fair trial on that charge, the jury needed to know the limits on the evidence as imposed by the State. Had the jury abided by the limiting instruction, and not considered the running of the stop sign, the collision, and the death of Effingham as evidence of the reckless driving charge, it is likely Matison would have been acquitted of reckless driving.

3. PROSECUTORIAL MISCONDUCT IN REBUTTAL CLOSING ARGUMENT DEPRIVED MATISON OF HIS RIGHT TO A FAIR TRIAL.

The prosecutor committed misconduct in rebuttal closing argument when he told that jury that holding Matison accountable for the death of Samantha Effingham was “their job.”

A prosecuting attorney is the representative of the sovereign and the community; therefore, it is the prosecutor’s duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based on reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct in closing argument can deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The right to a fair trial is a fundamental liberty interest secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503,

96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *In re Glasmann*, 175 Wn. 2d 696, 703, 286 P.3d 673 (2012).

Even when a defendant does not object in the trial court to improper acts by the prosecutor, this Court may review them where they are flagrant and ill-intentioned. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Here the prosecutor's argument was flagrant and ill-intentioned and calls for reversal of both of Matison's convictions.

The prosecutor left the jury with this flagrantly improper notion at the end of his rebuttal closing:

What he did was he drove in a reckless manner and because he did that, because there was a collision, and because the collision injured Samantha, and because she died because of those injuries, and because it happened in Washington, he's guilty of vehicular homicide.

He's also guilty of reckless driving because he drove a motor vehicle on that date in willful and wanton disregard for the safety of others or property in the State of Washington. Those are the elements of the crimes. *When all else fails, focus on those.*

One thing I agree with the Defense, no matter what we do in this case, Samantha Effingham is not coming back. *But, the person who took her life, should be held accountable. Do your job.* Thank you.

RP5B 1038 (emphasis added).

A defendant alleging improper argument by the prosecutor must establish both the impropriety and the prejudicial effect of the argument. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). To be entitled to

relief, the defendant must establish both the misconduct and a substantial likelihood it affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Perez-Mejia*, 134 Wn. App. 907, 916-17, 143 P.3d 838 (2006). Improper arguments are reviewed in the context of (1) the total argument; (2) the issues in the case; (3) the instructions given by the trial court; and (4) the evidence addressed in the argument. *Russell*, 125 Wn.2d at 85–86; *Perez-Mejia*, 134 Wn. App. at 916-17.

The total argument, the issue in the case, and the evidence addressed in the argument all focused on the same question: Should Matison face criminal liability for his driving both in passing the Helds and at the intersection of Northeast 29th and SR 502 where Effingham's life came to a sad and abrupt end? RP 3B 462-64. In rebuttal argument, the prosecutor improperly invited the jury to consider the legal elements of the two charges only “when all else fails” and to hold Matison “accountable” because that was their “job.” RP 5B 1,038.

The “job” of the jury is not to hold an accused accountable but to hold the State to its burden to prove every element of each and every charge to the beyond a reasonable doubt standard. *State v. Brown*, 147 Wn. 2d 330, 339, 58 P.3d 889 (2002).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson*, 172 Wn.2d 438, 448,

258 P.3d 43 (2011), a prosecutor must “seek convictions based only on probative evidence and sound reason,” *State v. Casteneda–Perez*, 61 Wn. App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991). It is improper for the State to employ in its arguments to the jury inflammatory comments which are a deliberate appeal to the passion and prejudices of the jury. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

Accountability in a compelling moral sense overshadowed the legal case against Matison. A troubling question was what level of emotional responsibility Matison accepted for himself. In his taped statement to the State Patrol two weeks after the accident, Matison had no recollection of passing the Hells. RP 4A 663. At trial, he similarly could not recall the pass. RP 4B 760. More significantly, in his statement to the State Patrol, Matison felt no guilt over Effingham’s death as it resulted from an accident. RP 4A 671-72. The prosecutor played Matison’s recorded lack of accountability to the jury in its case-in-chief. RP 4A 640-72. In his trial testimony, Matison’s feelings about Effingham’s death were limited to sorrow. RP 4B 768.

The prosecutor’s request for “accountability” also undermined the court’s instructions to the jury where the jury is told,

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider

the fact that punishment may follow conviction except insofar as it may tend to make you careful.

Supp. DCP, Court's Instructions to the Jury, Instruction 1, (sub. nom 117).

Rather than a caution not to focus on what punishment might be, given the the prosecutor's argument, this paragraph reminds the jury that without a conviction, there is no punishment. No conviction means no accountability. The jury heard the prosecutor's message.

To a jury of twelve citizens who were no doubt shocked and troubled by seeing Effingham's "beautiful life"⁸ reflected only in autopsy photos, accountability was a compelling emotion the prosecutor flagrantly and improperly played upon in closing argument. Matison's convictions should be reversed and remanded for a fair trial.

4 THE FELONY AND MISDEMEANOR JUDGMENTS AND SENTENCES SHOULD BE REMANDED FOR CORRECTION TO REFLECT THE CONCURRENT SENTENCES ORDERED BY THE COURT.

The court's oral ruling specified that Matison's felony sentence was to be served concurrently with his misdemeanor sentence.

THE COURT: I do agree with Mr. Sundstrom⁹ though, if the underlying offense has been used as a point, it would be a concurrent sentence. So the sentence of the Court will be 34 months, on the reckless driving it will be 364 days, 364 days suspended, 18 months of community custody, 24 months of probation on the reckless driving charge[.]

⁸ RP 5B 993 and 1008

⁹ defense counsel

RP 5B at 1069.

Yet, neither the felony nor the misdemeanor judgment and sentence include the “concurrent” language. Nowhere in either the misdemeanor judgment and sentence or the felony judgment and sentence does it specify that the 364-day misdemeanor suspended sentence is being served concurrently with Matison’s 34-month DOC sentence. CP 7-15, 16-28.

A trial court may correct a clerical error in a judgment and sentence at any time under CrR 7.8(a).¹⁰ *State v. Snapp*, 119 Wn. App. 614, 626, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004). A clerical error is one in which “the judgment, as amended, embodies the trial court’s intentions, as expressed in the record at trial.” *Snapp*, 119 Wn. App. at 627 (quoting *Presidential Estates Apartment Assoc. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). If an error is clerical, the amended judgment and sentence should correct the language to reflect the court’s intention or add the language that the court inadvertently omitted. *Snapp*, 119 Wn. App. at 627. In *Snapp*, the court concluded that omitting a treatment program condition from a judgment and sentence was clerical

¹⁰ CrR 7.8(a). Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

error because the clerk's minutes reflected the court had intended to impose the condition. *Snapp*, 119 Wn. App. at 627. In Matison's case, the court announced at sentencing that because the reckless driving conviction was used to increase the vehicular homicide offender score from 0 to 1, the two sentences were to be served concurrently. RP 5B 1069.

Matison's case should be remanded to the trial court to amend the judgments and sentences to reflect the court's intent that the felony and misdemeanor sentences be concurrent.

5. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PER CrR 3.5.

The trial court held a CrR 3.5 hearing to determine whether Matison's statements were the product of police coercion. However, the court failed to enter written findings of fact and conclusions of law as required by CrR 3.5(c). Even if this court concludes Matison's custodial statement was admissible, this court must remand the matter for the entry of written findings of fact and conclusions of law as the law requires.

CrR 3.5(c) provides, "Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefore." This rule plainly requires written findings of fact and conclusions of law. The

trial court provided an oral ruling that Matison's statement to investigating detectives was admissible, but no written findings or conclusions were ever entered. The trial court's failure to enter written findings and conclusions violate the clear requirements of CrR 3.5(c).

"It must be remembered that a trial judge's oral decision is no more than a verbal expression of his [or her] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). An oral ruling "has no final or binding effect, unless *formally incorporated into* the findings, conclusions, and judgment." *Id.* at 567 (emphasis added).

When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy." *State v. Smith*, 68 Wn. App. 201, 211, 842 P.2d 494 (1992). This is so because the court rules promulgated by our supreme court provide the basis for a "consistent, uniform approach." *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). "[A]n appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." *Id.* at 624. However, where a defendant cannot show actual prejudice from the absence of

written findings and conclusions, the remedy is remand for entry of written findings of fact and conclusions of law. *Id.* at 624.

Here, the trial court did not enter written findings or conclusions following the CrR 3.5 hearing and provided only an oral ruling. This court must therefore remand this matter to the trial court for entry of the findings and conclusions required by CrR 3.5(c).

E. CONCLUSION

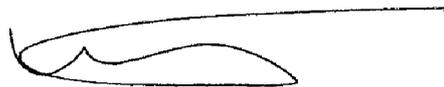
Matson's convictions should be reversed because the prosecutor's remarks in rebuttal argument deprived Matson a fair trial.

Alternatively, this court should reverse and remand the reckless driving conviction for retrial based on its improper joinder with the vehicular homicide.

Absent reversal, the trial court should be instructed to correct the judgments and sentences to reflect the trial court's order that Matson's sentences be served concurrently.

Finally, the trial court should be instructed to enter written findings of fact and conclusions of law pursuant CrR 3.5.

Dated this 8th day of May 2015.



LISA E. TABBUT, WSBA #21344
Attorney for Ryan Levi Matson

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Anne Mowry Cruser, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Ryan Levi Matison/DOC# 376547, Larch Corrections Center 15314 NE Dole Valley Rd., Yacolt, WA 98675-9531.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 8, 2015, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Ryan Levi Matison

COWLITZ COUNTY ASSIGNED COUNSEL

May 08, 2015 - 6:13 PM

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