

No. 47558-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Docie Burch,

Appellant.

Mason County Superior Court Cause No. 14-1-00554-7

The Honorable Judge Amber Finlay

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ARGUMENT

THE COURT SHOULD HAVE INSTRUCTED JURORS ON THE STATE’S BURDEN TO PROVE ORDINARY NEGLIGENCE, WHICH REMAINS AN ESSENTIAL ELEMENT OF VEHICULAR HOMICIDE AND VEHICULAR ASSAULT.

A. Respondent implicitly concedes that any error requires reversal.

Vehicular homicide and vehicular assault require proof of ordinary negligence. *State v. Lovelace*, 77 Wn. App. 916, 919, 895 P.2d 10 (1995) (vehicular assault); *State v. McAllister*, 60 Wn. App. 654, 659, 806 P.2d 772 (1991)¹ (vehicular homicide). As an essential element, ordinary negligence must be included in the “to convict” instruction for each offense. *See State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004); *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

The court’s “to convict” instructions in this case did not require proof of Ms. Burch’s ordinary negligence. CP 39, 43. This requires reversal of Ms. Burch’s convictions. *Smith*, 131 Wn.2d at 263.

Respondent does not suggest that any error was harmless. Brief of Respondent, pp. 4-11. This failure to address harmless error may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, the omission, if error, requires reversal.

¹ *Abrogated on other grounds by State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005).

Smith, 131 Wn.2d at 263. Ms. Burch’s case must be remanded for a new trial with proper instructions. *Id.*

B. The legislature did not intend vehicular homicide and vehicular assault to be strict liability crimes.

Strict liability offenses are not favored. *State v. Warfield*, 119 Wn. App. 871, 876, 80 P.3d 625 (2003), *as amended* (Jan. 21, 2004). Absent an explicit *mens rea* element, courts consider a number of factors (the “*Bash* factors”) to determine whether or not the legislature intended to create a strict liability offense. *Id.*, at 879 (citing *State v. Bash*, 130 Wn.2d 594, 605-606, 925 P.2d 978 (1996)).

Analysis of these factors shows that the legislature did not intend vehicular homicide and vehicular assault to be strict liability crimes.² Accordingly, the court should have instructed jurors on the state’s burden to prove ordinary negligence. *Id.*

First, examination of the common law suggests that the two offenses are not strict liability crimes. A statute must be construed “in light of the background rules of the common law, and its conventional *mens rea* element.” *State v. Anderson*, 141 Wn.2d 357, 363, 5 P.3d 1247 (2000) (internal quotation marks omitted, quoting *Bash*, 130 Wn.2d at

² Only two factors weigh in favor of strict liability: the danger that entirely innocent conduct would be criminalized and the risk of serious harm to the public. *Id.*, at 363.

605-606). There is no direct common-law analogue for vehicular homicide or vehicular assault. *Cf. Warfield*, 119 Wn. App. at 879. The closest common-law antecedents are manslaughter and assault. Neither were founded upon strict liability.³ This suggests that the legislature did not intend to impose strict liability.

Second, neither crime is a “public welfare offense,” and thus neither statute is likely to impose strict liability. *Anderson*, 141 Wn.2d at 363. Public welfare crimes are generally those which are regulatory in nature, with no direct or immediate injury to person or property. *Id.* Neither vehicular homicide nor vehicular assault can be categorized as public welfare offenses; by definition, both require harm to persons.

Third, the high penalty that attends conviction of either offense suggests the legislature did not intend strict liability. *Id.*, at 364-365. Crimes resulting in harsh penalties are more likely to require proof of a culpable mental state. *Id.* Vehicular homicide is a class A felony; vehicular assault is a class B felony. RCW 46.61.520; RCW 46.61.522.

Fourth, the ease with which a person can “ascertain the true facts” suggests that the legislature did not intend strict liability. *Id.* Any person

³ See *State v. Williams*, 4 Wn. App. 908, 912, 484 P.2d 1167 (1971) (discussing the requirement of “gross negligence” for involuntary manslaughter) and *State v. Sample*, 52 Wn. App. 52, 55, 757 P.2d 539 (1988) (noting that negligent conduct would not constitute assault at common law).

who drinks and drives knows that negligent driving may result. This weighs against strict liability. *Id.*

Fifth, proof of fault will not be “difficult and time-consuming”⁴ for the state given the “hundreds of minor oversights and inadvertences” that can comprise ordinary negligence. *State v. Ferguson*, 76 Wn. App. 560, 569, 886 P.2d 1164 (1995) (internal quotation marks and citation omitted). This, too, weighs against strict liability. *Anderson*, 141 Wn.2d at 363.

Sixth, the number of prosecutions for vehicular assault and vehicular homicide is relatively low.⁵ This makes it more likely that the legislature intended conviction to require proof of a culpable mental state. *Id.*, at 365.

For all these reasons, both statutes should be interpreted to require proof of ordinary negligence. *Id.* The omission of that element from each “to convict” instruction requires reversal of Ms. Burch’s convictions. *Id.*, at 367.

⁴ *Id.*

⁵ In 2014, only 22 people were sentenced for vehicular homicide committed by means of intoxication. See Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing*, p. 12 (2014) (available at www.cfc.wa.gov). The combined total for vehicular assaults committed by means of intoxication or reckless driving was 103. Caseload Forecast Council, p. 12. Thus, the state saw far fewer convictions for these offenses than, for example, second-degree assault (715), second-degree burglary (1,191), or first-degree trafficking in stolen property (396). Caseload Forecast Council, pp. 4, 12.

C. The legislature has implicitly endorsed the “ordinary negligence” element of vehicular homicide in amendments enacted subsequent to *McAllister*.⁶

Consistent with the analysis outlined above, the *McAllister* court interpreted RCW 46.61.520 to require proof of ordinary negligence.

McAllister has not been overruled, and no substantive amendments have been enacted since the case was decided. Thus *McAllister* controls Ms. Burch’s case with respect to the vehicular homicide charge.⁷

Respondent erroneously relies on a 1991 amendment to argue that the legislature has removed the “ordinary negligence” requirement. Brief of Respondent, pp. 6-10. This reliance is misplaced, because the 1991 amendment made only a minor organizational change.⁸ Laws of 1991, Ch. 348 §1.

The 1991 amendment did little more than subdivide the vehicular homicide statute into three lettered subsections (a), (b), and (c).⁹ Laws of 1991, Ch. 348 §1. This non-substantive change enabled the legislature to separately reference the three alternative means of committing the offense.

⁶ Although the same element was omitted from both the vehicular homicide and vehicular assault instructions, the statutory language, legislative history, and cases interpreting each offense differ. Accordingly, they will be addressed in separate sections here.

⁷ The vehicular assault charge is analyzed below.

⁸ The prior and amended statutes are set forth in Appendix A.

⁹ This enabled the legislature to separately reference the three alternative means of committing the offense, which it did in other sections of the 1991 Act. *See* Laws of 1991, Ch. 348 §2.

It did so in other sections of the 1991 Act, attaching extra consequences to violations of what became RCW 46.61.520(1)(a) (vehicular homicide by means of intoxication). *See* Laws of 1991, Ch. 348 §2. Section 1 of the 1991 act did not purport to make any substantive change to the offense. *See* Laws of 1991, Ch. 348 §1.

Courts presume that the legislature is familiar with judicial interpretations of a statute. *State v. Ervin*, 169 Wn.2d 815, 825, 239 P.3d 354 (2010). Absent evidence of legislative intent “to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions.” *Id.* (internal quotation marks and citation omitted).

RCW 46.61.520 has been amended three times¹⁰ since the *McAllister* decision, without any indication that the legislature intended to “overrule” *McAllister*. *Id.* Indeed, the legislature passed the 1991 amendment just a few months after the *McAllister* decision, but made no reference to the case and did not make any substantive change to the elements of the offense. Laws of 1991, Ch. 348 §1.¹¹ Accordingly, the *McAllister* court’s interpretation remains controlling. *Ervin*, 169 Wn.2d at

¹⁰ Two of the amendments affected only the penalty provisions. *See* Laws of 1996, Ch. 199 §1; Laws of 1998, Ch. 211, §2.

¹¹ The amendment passed in May of 1991; *McAllister* was decided in March of that same year.

825. The state must prove ordinary negligence to obtain a conviction under RCW 46.61.520(1)(a). *McAllister*, 60 Wn. App. at 659.

Respondent does not acknowledge the lack of substantive change under the 1991 amendment. Instead, Respondent makes contradictory arguments regarding *McAllister*. First, Respondent erroneously implies that *McAllister* was overruled *sub silentio* by the Supreme Court in *Rivas*. See Brief of Respondent, pp. 6, 8 (citing *State v. Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995)). Second, Respondent repudiates this implied argument by explicitly acknowledging that “*Rivas* does not overrule *McAllister*.” See Brief of Respondent, p. 9.

In fact, the *Rivas* court cited *McAllister* with approval. *Rivas*, 126 Wn.2d at 453. It neither overruled *McAllister* nor addressed the “ordinary negligence” element recognized by the court in that case. Instead, *Rivas* held that the state need not prove a causal connection between the driver’s intoxication and the victim’s death.¹² *Rivas*, 126 Wn.2d at 451-454. *Rivas* thus effectively overruled *MacMaster*, a 1989 case not mentioned by the *McAllister* court. *Rivas*, 126 Wash. 2d at 451-454; see also *State v. Salas*,

¹² The *Rivas* court’s interpretation of the 1991 amendments is suspect, given its failure to recognize that amendments are presumed to be consistent with previous judicial decisions. *Ervin*, 169 Wn.2d at 825. The *Rivas* court did not mention the non-substantive nature of the 1991 amendments. Instead, the court justified its interpretation on grounds that “the Legislature did not add the *MacMaster* element to the statute nor did it specifically indicate that the amendment was intended to overrule the *MacMaster* decision.” *Rivas*, 126 Wn.2d at 451 (citing *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989)). This approach conflicts with the rule spelled out in *Ervin*.

127 Wn.2d 173, 181, 897 P.2d 1246 (1995) (“We recently held in *State v. Rivas* that the nonstatutory element of a causal connection between *intoxication* and death... no longer applies following the 1991 amendment to RCW 46.61.520”) (emphasis added) (footnote omitted).

The *Rivas* court outlined the state’s obligation to prove a causal connection between “the act of driving and the accident.” *id.*, at 451. This is entirely consistent with the “ordinary negligence” element recognized by *McAllister* and implicitly sanctioned by the legislature in the 1991 amendment and subsequent enactments.¹³

McAllister’s negligence requirement fits within the overall statutory scheme. An intoxicated driver may be convicted based on a showing of ordinary negligence, which encompasses “hundreds of minor oversights and inadvertences.” *Ferguson*, 76 Wn. App. at 569 (internal quotation marks and citation omitted). By contrast, sober drivers may only be convicted upon proof of recklessness (RCW 46.61.520(1)(b)) or disregard for the safety of others (RCW 46.61.520(1)(c)), which is “an aggravated kind of negligence” requiring “[s]ome evidence of the

¹³ In fact, the *Rivas* court specifically refused to characterize the vehicular homicide statute as a “strict liability” offense. *Id.*, at 453. Instead, *Rivas* noted that the statute would be permissible, “even if [it] sets forth a strict liability crime.” *Id.* The *Rivas* court predated *Bash*, and thus did not apply the multi-factor analysis outlined in that case for determining whether or not the legislature intended to create a strict liability crime.

defendant's conscious disregard” of danger.” *State v. Lopez*, 93 Wn. App. 619, 623, 970 P.2d 765 (1999).

Vehicular homicide requires proof of ordinary negligence. *McAllister*, 60 Wn. App. at 659. The legislature has left this requirement intact through three separate amendments. *Ervin*, 169 Wn.2d at 825; see Laws of 1991, Ch. 348 §1; Laws of 1996, Ch. 199 §1; Laws of 1998, Ch. 211, §2. Neither the 1991 amendment nor the Supreme Court’s *Rivas* decision undermines the continuing vitality of *McAllister*.

The trial court’s omission of the “ordinary negligence” element from the “to convict” instruction relieved the state of its burden and violated Ms. Burch’s right to due process. *Smith*, 131 Wn.2d at 263. Her vehicular homicide conviction must be reversed and the case remanded for a new trial with proper instructions. *Id.*

- D. The 2001 amendment to the vehicular assault statute did not impose strict liability.¹⁴
 - 1. The Supreme Court did not resolve the conflict between *Hursh* and *Lovelace* prior to enactment of the 2001 amendment to RCW 46.61.522.

Within the span of a few months in 1995, Division 1 of the Court of Appeals issued conflicting decisions regarding the necessity of proving

¹⁴ As noted above, the two offenses are discussed separately because the statutory language, legislative history, and cases interpreting each statute differ.

ordinary negligence in vehicular assault cases. Both decisions preceded the Supreme Court's decision in *Bash*, and thus neither had the benefit of the multi-factor analysis set forth in that case.

First, the court unequivocally concluded that “RCW 46.61.522 cannot be construed to require a showing of negligent conduct as an element of vehicular assault.” *State v. Hursh*, 77 Wn. App. 242, 246, 890 P.2d 1066 (1995).¹⁵ According to the *Hursh* court, “[t]o attempt such a construction would be to read into the statute an element which is not there.” *Id.*, at 246-47. The *Hursh* court did not analyze the statute to determine whether or not the legislature intended a strict liability offense.

Two months after publication was ordered in *Hursh*¹⁶, and without reference to that decision, Division 1 issued *Lovelace*. The *Lovelace* court found that conviction of vehicular assault requires proof of “ordinary negligence and intoxication while driving.”¹⁷ *Lovelace*, 77 Wn. App. at 919 (citing *McAllister* and *MacMaster*). The *Lovelace* court did not analyze the statute to determine whether or not the legislature intended a strict liability offense.

¹⁵ *Abrogated on other grounds by Roggenkamp*, 153 Wn.2d 614.

¹⁶ The opinion issued in January of 1995; publication was ordered on March 13, 1995. *Id.*

¹⁷ Curiously, Chief Judge Pekelis authored *Lovelace* and joined the decision in *Hursh*.

The Supreme Court has not resolved the conflict between *Hursh* and *Lovelace Rivas*, which involved the vehicular homicide statute, did not address the ordinary negligence element which had previously been recognized for that offense by the *McAllister* court. Nor did *Rivas* mention the vehicular assault statute, *Hursh*, or *Lovelace*.

2. The *Bash* factors suggest that vehicular assault is not a strict liability offense; the 2001 amendment does not affect the ordinary negligence element.

As outlined above, the *Bash* factors weigh in favor of a mens rea requirement, suggesting that *McAllister* and *Lovelace* were correctly decided. Unfortunately, both of those cases preceded *Bash*, and thus did not rely on the correct analysis for reaching the proper result. Instead, *Lovelace* (a vehicular assault case) simply cited to *McAllister* (a vehicular homicide case).

Because the cases involved different crimes, the *Lovelace* court's reliance on *McAllister* is questionable.¹⁸ The *Lovelace* court created additional problems by implying that ordinary negligence was necessary to establish proximate cause. *Lovelace*, 77 Wn. App. at 919 (citing *McAllister*, 60 Wn. App. at 658-59.)

¹⁸ Furthermore, in the absence of the *Bash* factors, the *McAllister* court's decision lacked a proper foundation. However, as outlined above, the court reached the correct result under *Bash* and its progeny.

In fact, as discussion of the *Bash* factors shows, ordinary negligence is an implied element, independent of the other elements required to prove vehicular assault. This is important because the 2001 amendment removed the state's burden to prove that the driver's intoxication proximately caused bodily harm. Laws of 2001, Ch. 300, §1.¹⁹ The 2001 amendment did not purport to create a strict liability offense.²⁰ Thus, under the *Bash* factors, RCW 46.61.522 should not be construed to impose strict liability.

The legislature has not clearly stated an intent to impose strict liability for vehicular assault committed by means of intoxication. RCW 46.61.522. The requirement of ordinary negligence fits within the overall statutory scheme, which requires proof of recklessness or aggravated negligence for sober drivers who injure others.

Because the trial court failed to instruct jurors on the state's obligation to prove ordinary negligence, Ms. Burch's vehicular assault conviction must be reversed. *Smith*, 131 Wn.2d at 263.

¹⁹ The prior and current statutes are set forth in Appendix B. A prior amendment in 1996 affected only the penalty. Laws of 1996, Ch. 199, §8.

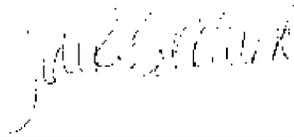
²⁰ Nor should it be interpreted as a response to either *Hursh* or *Lovelace*, since it came more than five years after those cases were decided.

CONCLUSION

The trial court's instructions relieved the state of its burden of proving ordinary negligence. Ms. Burch's convictions must be reversed, and the charges remanded for a new trial with proper instructions.

Respectfully submitted on December 3, 2015,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Docie Burch, DOC #382543
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

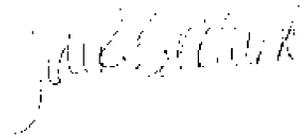
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Mason County Prosecuting Attorney
timw@co.mason.wa.us

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

Signed at Olympia, Washington on December 3, 2015.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX A

Effect of the 1991 Amendment to RCW 46.61.520 (Vehicular Homicide)

Former RCW 46.61.520(1)
(Effective until July 1, 1991)

46.61.520. Vehicular homicide—Penalty

(1) 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 while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner or with disregard for the safety of others, the person so operating such vehicle is guilty of vehicular homicide.

RCW 46.61.520(1) (Effective July 1, 1991)

46.61.520. Vehicular homicide—Penalty

(1) 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:

- (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or
- (b) In a reckless manner; or
- (c) With disregard for the safety of others.

APPENDIX B

Effect of the 2001 Amendment to RCW 46.61.522 (Vehicular Assault)

Former RCW 46.61.522(1)
(Effective until July 22, 2001)

46.61.522. Vehicular assault—Penalty

- (1) A person is guilty of vehicular assault if he operates or drives any vehicle:
- (a) In a reckless manner, and this conduct is the proximate cause of serious bodily injury to another; or
 - (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and this conduct is the proximate cause of serious bodily injury to another.

RCW 46.61.522(1)
(Effective July 22, 2001)

46.61.522. Vehicular assault—Penalty

- (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
- (a) In a reckless manner and causes substantial bodily harm to another; or
 - (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or
 - (c) With disregard for the safety of others and causes substantial bodily harm to another.

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