

FILED
Court of Appeals
Division II
State of Washington
1/13/2020 8:00 AM
NO. 53189-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

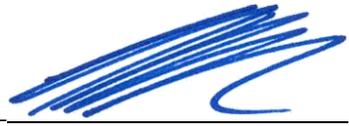
MATTHEW STEVEN JOHNSON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID EDWARDS , JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: 
RANDY J. TRICK
Deputy Prosecuting Attorney
WSBA # 45190

Grays Harbor County Prosecuting Attorney
102 West Broadway Room 102
Montesano, WA 98563
(360) 249-3951

TABLE OF CONTENTS

I. RESTATEMENT OF THE ISSUES 1

II. STATEMENT OF FACTS..... 2

III. ARGUMENT..... 5

Corpus delicti requires the state to provide only *prima facie*
evidence of the crime 6

The state provided *prima facie* evidence of a criminal act, which the
court found disregarded the safety of others 9

The state need not show the appellant’s intent, merely a negligent
act 11

If the *corpus delicti* for vehicular assault requires a showing of
more than a negligent act, the acts describe rise to disregarding the
safety of others, as the trial court found 15

Appellant posits speculative reasons why the car’s positioning
supports a hypothesis of innocence without any factual basis 17

The court did not address causation in ruling on *corpus delicti*, but
the record establishes ample evidence of causation 18

The state presented sufficient evidence of proximate cause to
convict, and the court correctly found no intervening cause..... 20

IV. CONCLUSION 27

TABLE OF AUTHORITIES

Supreme Court Cases

<i>Bremerton v. Corbett</i> , 106 Wn.2d 569, 723 P.2d 1135 (1986)	6, 15
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996)	7, 8, 9, 17, 18
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006)	6, 9, 11, 12
<i>State v. Cardenas-Flores</i> , 189 Wn.2d 243, 401 P.3d 19 (2017)	8, 9
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	8
<i>State v. Judge</i> , 100 Wn.2d 706, 675 P.2d 219 (1984)	24
<i>State v. Meyer</i> , 37 Wn.2d 759, 226 P.2d 204 (1951)	7, 9
<i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997)	8
<i>State v. Reynolds</i> , 144 Wn.2d 282, 27 P.3d 200 (2001)	21
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005)	20, 25
<i>State v. Sweany</i> , 174 Wn.2d 909, 281 P.3d 305 (2012)	8

Court of Appeals Cases

<i>State v. Roggenkamp</i> , 115 Wn. App. 927, 943, 64 P.3d 92 (2003) ..	21, 23, 24, 25
--	-------------------

Statutes

RCW 46.61.522	15
RCW 46.61.560	12, 15
RCW 46.61.575	15
RCW 46.61.605	27

Other Authorities

Washington Pattern Jury Instruction 90.05	10
Washington Pattern Jury Instruction 91.07	20

I. RESTATEMENT OF THE ISSUES

1. Did the State present independent proof to establish a *prima facie* showing of the *corpus delicti* of the charged offense when multiple witnesses observed the Appellant's in his vehicle jutting straight out into traffic, perpendicular to the fog line, with the front half of the vehicle obstructing the lane of travel on a busy divided highway, such that his statement to police that he was backing into his driveway from the shoulder may be considered by the court in determining guilt.
2. Did the State present sufficient evidence to prove beyond a reasonable doubt that the Defendant was the proximate cause of injuries sustained by a motorist when she struck the back of a truck that had stopped suddenly due to the Appellant's vehicle obstructing the lane of travel on a busy highway when the injured motorist testified that she was paying full attention to her driving, going the speed limit, saw the Appellant's vehicle on the side of the road, became alert to it, and even tapped her brakes before the truck in front of her suddenly stopped, such that the trial court correctly found her failure to stop did not constitute an intervening cause because no evidence indicated she drove negligently, too close, or did anything other than reasonably react when confronted with an emergency?

II. STATEMENT OF FACTS

The Appellant, Michael Johnson, lives near the Lemay's transfer station along State Route 12 east of Aberdeen. That property has a driveway access to Highway 12. In that area State Route 12 is "two lanes each direction, separated with cement jersey barriers, fully marked, dashed center line separating the two westbound lanes, a painted fog line, and then a paved shoulder wide enough to park a car on, in most locations in that area." RP 40. That area has no visual obstructions and is lit.

On the night of October 6, he was driving his white 1997 Chevrolet Cavalier registered to him RP 44. Tyler Newport, driving his pickup truck, a Ford F-350, westbound on Highway 12 from Montesano to Aberdeen, had to slam on his brakes suddenly to avoid striking the car. Mr. Newport's girlfriend, Hanna Himley, was in the passenger seat. RP 13. Both were paying attention; no distractions in the car. RP 14. Mr. Newport drove in the right hand lane at the speed limit of 50 miles per hour. RP 14-16.

It was about 7 p.m. on a Thursday, still light out, with some sprinkling rain, but "not wet enough to cause a problem." RP 22.

Mr. Newport had to slam on his brakes because a red truck was directly in front of him in the same lane and its brake lights flashed on and

it “jumped” abruptly, without signaling, into the left hand lane. RP14-17. Once that truck was out of the field of view, Ms. Himley could see the Appellant’s car. It was pulled half way into the lane of travel. She said “The nose of the car was in the lane almost perpendicular to the white shoulder stripe. And the white shoulder stripe was about mid-way between the front and the back of the car. So, the car was half way of the car length into the lane.” RP 17.

Because the Appellant’s car was in the lane of travel, causing Mr. Newport to suddenly bring his truck to a stop, the vehicle behind him was also faced with a sudden emergency.

Ms. Barnes, driving her 2003 Ford Ranger, actually saw the Appellant’s car “out of the corner of [her] eye” as she proceeded along Highway 12, a route she has taken countless times. RP 26-27. She also was paying full attention, driving without any distractions. RP 27. She saw the Appellant’s vehicle but “couldn't tell if it was moving or if it was backing up or what, but it was out there so close to the highway that it was a concern ... it was out there very close to the line, edge of the highway, if not over it.” RP 27-28. She covered her brakes, tapping them even looked back to the freeway, glancing back in her mirrors. RP 28-29. With her

brakes tapped (she could not remember if she could fully apply them) she collided with Mr. Newport's truck. RP 27-28.

Ms. Barnes sustained a laceration above her eye that bled "very much" and a fractured kneecap (patella). RP 29-30.

At trial, the Appellant stipulated that Ms. Barnes' injuries constituted substantial bodily harm, and that the collision caused them. RP 5.

Washington State Patrol Trooper Matt Rabe responded to the scene. Trooper Rabe had been a collision technical specialist for ten years at that point. RP 36. He was Field Training Officer to another, Trooper Ford. RP 37. Mr. Johnson explained to why Mr. Newport had needed to slam on his brakes—"he had pulled on to the shoulder of State Route 12, was backing into his driveway, and he heard brakes screeching" RP 47. The Appellant told Trooper Rabe he believed the collision was Ms. Barnes's fault, not his. RP 50. Ms. Barnes heard that statement as well, as she sat in her truck, bleeding, waiting for the paramedics. RP 32.

The State charged Mr. Johnson with one count of vehicular assault, alleging he "did drive or operate a vehicle with disregard for the safety of others and caused substantial bodily harm to Marilyn J. Barnes." CP 33. Mr. Johnson proceeded to a bench trial. CP 29.

At trial, the Hon. David Edwards found the Defendant guilty as charged. CP 22-26; RP 83-85. This appeal timely follows.

III. ARGUMENT

The Appellant argues that the State failed to produce sufficient evidence to satisfy the low burden of establishing *corpus delicti*, and also failed to produce sufficient evidence of support a finding of guilt. Specifically, Appellant's first Assignment of Error concerns the *corpus delicti* issue, where the State need only provide corroborating evidence of a criminal act and causation. The Appellant also posits innocuous explanations that the trial the court allegedly ignored, but those explanations are purely speculative and should be ignored by the reviewing court as well.

The Appellant also argues that the State did not prove, beyond a reasonable doubt, that the Appellant's driving was the proximate cause of Mr. Barnes's injuries. She was in a pickup that hit a pickup that stopped short of hitting the Appellant's vehicle as it blocked traffic during an alley-backing maneuver. The Appellant argues that Ms. Barnes did not stop in time, and that constitutes a neglectful intervening cause. Appellant argues that "Ms. Barnes, on the other hand, was following too closely to Mr. Newport's truck and did not apply the brakes of her car sufficiently

quickly to avoid a collision.” Appellant’s brief, 19. Appellant mischaracterizes the testimony—she was applying the brakes but could not recall if she was able to fully apply the brakes. No evidence suggested she was following too close, and the issue was directly addressed by the Court in rendering its verdict. Ms. Barnes driving responsibly and was faced with an emergency, and acted reasonably.

CORPUS DELICTI REQUIRES THE STATE TO PROVIDE ONLY
PRIMA FACIE EVIDENCE OF THE CRIME

The Appellant well and succinctly outlines the corpus delicti rule and the burden of production on the State. The term “*corpus delicti*” refers to the legal principle that a defendant’s statements alone are not sufficient to establish that a crime took place. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). The purpose of this common law rule is to safeguard against the conviction of innocent persons, protect against unjust convictions based only upon a false confession, and prevent the possibility that such a confession was falsely obtained through coercion, abuse, or even voluntarily. *Bremerton v. Corbett*, 106 Wn.2d 569, 576–77, 723 P.2d 1135 (1986).

The *corpus delicti* rule, fully explained, goes thusly:

The confession of a person charged with the
commission of a crime is not sufficient to establish

the *corpus delicti*, but if there is independent proof thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession. The independent evidence need not be of such a character as would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it *prima facie* establishes the *corpus delicti*.

State v. Meyer, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951). *Prima*

facie means that there is “evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved.” *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996).

Typically, prosecutors and defense attorneys argue *corpus delicti* at the trial court level when an event has occurred, but whether that event is a crime depends on who was responsible. For example, a vehicle may have crashed off the side of the road with three people in the car, but the crime of Driving Under the Influence may only have occurred if the person driving the car was intoxicated. Police may find a firearm in a backpack, but the crime of unlawful possession of a firearm has only occurred if that backpack was possessed by a felon. Evidence to establish *corpus delicti* could consist of indicia of ownership also found in that backpack, for example.

Seen less often at the trial level, but more often by appellate courts, is the question of *corpus delicti* to determine if a potentially criminal act occurred at all. In those instances, the confession of a defendant constitutes a key piece of evidence, and the common law purpose of protecting individuals against “unjust convictions based only upon a false confession” as described in *Corbett* becomes more apparent.

The Appellant correctly states that *corpus delicti* is a rule of sufficiency, not merely a rule of evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 257, 401 P.3d 19, 27 (2017). As such, the reviewing court looks at the totality of the evidence to determine whether the finder-of-fact’s decision is untenable. While a reviewing court reviews the record *de novo*, the standard is low—“The standard of review for a challenge to the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997); *Aten*, 130 Wn.2d at 666–67; *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305, 307 (2012); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In determining whether there is sufficient evidence of the *corpus delicti* independent of the defendant’s statements, the Court must assume the “truth of the State’s

evidence and all reasonable inferences from it in a light most favorable to the State.” *Cardenas-Flores*, 189 Wn.2d at 257, *quoting Aten*, 130 Wn.2d at 658. The independent evidence did not need to rise to that which would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. *Meyer*, 37 Wn.2d at 763. The independent evidence need only support “a logical and reasonable inference of the facts the State seeks to prove.” *Brockob*, 159 Wn.2d at 328. That independent evidence “must be consistent with guilt and inconsistent with an hypothesis of innocence.” *Cardenas-Flores*, 189 Wn.2d at 264, *quoting Aten*, 130 Wn.2d at 660.

THE STATE PROVIDED *PRIMA FACIE* EVIDENCE OF A CRIMINAL ACT, WHICH THE COURT FOUND DISREGARDED THE SAFETY OF OTHERS

In conducting this inquiry, it is important to note that, “While the State must establish the mental element of the crime beyond a reasonable doubt to sustain a conviction, mens rea is not required to satisfy *corpus delicti*.” *Cardenas-Flores*, 189 Wn.2d at 263–64. Thus, in considering whether the evidence presents a hypothesis of innocence, Mr. Johnson’s thoughts are not relevant to considering the corroborating evidence. The Appellant was charged with Vehicular Assault for driving or operating a vehicle with disregard for the safety of others and caused substantial

bodily harm.” CP 33. The substantial bodily harm is not in dispute. The state need only provide *prima facie* corroborating evidence of an act done in disregard for the safety of others, and the causation connected to the injury.

The "Disregard for the Safety of Others" standard is a specific standard unique to the criminal offenses of vehicular assault and vehicular homicide. It is a higher standard than civil negligence, but less than criminal recklessness. CP 39. The Washington Pattern Jury Instructions define it thusly:

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 39; WPIC 90.05.

Thus, the issue is not whether the evidence corroborates an intent to cause an injury, but to commit an act that meets the definition of "disregard for the safety of others," and a simple line of causation. Instead,

the Appellant argues that the court's finding of *corpus delicti* was improper by turning the question into one of sufficiency of the evidence that requires ruling out any intervening causes of Ms. Barnes's injuries, and to satisfy that an act by the Appellant was the proximate cause of the injuries. This argument requires the court to go too far in determining whether *corpus delicti* exists. *Corpus delicti* is a very low bar for the State to meet. Issues such as intervening causes and the like are best reserved for sufficiency of the evidence to convict (as Appellant has raised and as are discussed below). All the State need to prove to satisfy *corpus delicti* is the initial criminal act, and a line of causation.

THE STATE NEED NOT SHOW THE APPELLANT'S INTENT,
MERELY A NEGLIGENT ACT

The charge of vehicular assault under the "disregard for the safety of others prong" requires a showing akin to negligence. The issue, therefore, is not whether the evidence corroborates an intent to cause an injury, but to commit an act that was neglectful. The Appellant's desire to cause the consequences that followed his neglectful act are not relevant to the issue of *corpus delicti*. For that reason, the Appellant's reliance on *Brockob* does not help this court. The matters decided in *Brockob* all dealt with evidence of a person's intent. *Brockob*, 159 Wn.2d 311. The court

overturned Mr. Brockob's conviction for possession of Sudafed with the intent to manufacture methamphetamine because the mere theft of Sudafed was insufficient to show intent to manufacture methamphetamine. While there was sufficient evidence of theft, what Mr. Brockob intended to do with the Sudafed had no other corroborating evidence. *Id.*, at 332-33. But, with regard to Mr. Gonzales, whose similar case was joined with Mr. Brockob's, the court found there was sufficient evidence of an intent to manufacture methamphetamine because Mr. Gonzales also possessed coffee filters, another item used in the manufacturing. In that case there was corroborating evidence of the crime. *Id.*, at 333.

The Court's ruling on the corpus issue focused on whether there was evidence of a criminal act that triggered the chain of events that led to Mr. Barnes' harm. All that needed to be presented was the initial act sufficient to find it was criminally negligent. The Court, with the corpus issue having been raised by defense counsel through an objection, cited RCW 46.61.560 and 570—"both speak to the duty of a driver when it comes to stopping or parking a vehicle, and prohibits that to be done under certain conditions. And, [RCW] 46.61.570, provides that except when necessary to avoid conflict with other traffic, no person shall stop, stand, or park a vehicle on the roadway." RP 65. The Court denied the motion to

dismiss. “This white vehicle was stopped, at least partially in the traveled portion of the westbound lane of SR 12 in such a way as to obstruct other vehicles. And that's a crime.” RP 71.

In reaching its ruling, the Court had before it the testimony from Ms. Barnes and Ms. Himley regarding the white car’s positioning on the roadway, with Mr. Johnson inside it. Mr. Barnes testified that she could see the car as she was approaching, and it was on the side of the road out, but she “couldn't tell if it was moving or if it was backing up or what, but it was out there so close to the highway that it was a concern.” RP 27. She said it was “it was out there very close to the line, edge of the highway, if not over it.” RP 28. She said “I didn't know if it was moving forward or backward” consistent with it being parallel with the roadway. RP 28. She lost sight of it as Mr. Newport’s truck blocked her view as they approached.

Ms. Himley testified “What we saw was a white car that was pulled half way into the lane that we were in ... The nose of the car was in the lane almost perpendicular to the white shoulder stripe. And the white shoulder stripe was about mid-way between the front and the back of the car. So, the car was half way of the car length into the lane.” RP 14-17. The car was not just described as being poorly parked on the side of the

road, like it had broken down, but pointing straight out across the right lane, about halfway into the lane of travel. Because the truck in front of Mr. Newport “jumped into the next lane over to the left [...] I don't think that they signaled; they didn't have time [...] It was abrupt,” an inference can be made that the white car was not just an obstruction that was stationary, like a parked disabled car, but one that was moving and caused a sudden unexpected change for the first red truck. RP 14-17.

The car being perpendicular to the highway is consistent with Mr. Barnes's saying it could have been “backing up or what,” and is inconsistent with any suggestion that it was broken down and parked on the side, or anything innocuous. The Appellant states that the car being positioned that way “in itself is not a crime.” But, the descriptions from the witnesses just as easily support the inference that Mr. Johnson was trying to pull into traffic without yielding.

While the Court cited RCW 46.61.570, which makes parking, stopping or standing a car on an elevated section of a highway unlawful, there are multiple other statutes violated by the Appellant in placing or having his car in the position it was when he caused the collision, other than the prohibition on backing on a highway. “Every vehicle stopped or parked upon a two-way roadway shall be so stopped or parked with the

right-hand wheels parallel to and within twelve inches of the right-hand curb or as close as practicable to the right edge of the right-hand shoulder.” RCW 46.61.575(1). And, “Outside of incorporated cities and towns no person may stop, park, or leave standing any vehicle, whether attended or unattended, upon the roadway.” RCW 46.61.560(1). Partially blocking the lane of travel a crime. There is simply no innocuous reason why a car would be halfway into the roadway, perpendicular to traffic--it cannot be said the state’s facts supported a hypothesis of innocence.

IF THE *CORPUS DELICTI* FOR VEHICULAR ASSAULT REQUIRES
A SHOWING OF MORE THAN A NEGLIGENT ACT, THE ACTS
DESCRIBE RISE TO DISREGARDING THE SAFETY OF OTHERS,
AS THE TRIAL COURT FOUND

The Appellant argues that the Court cannot find *corpus delicti* as it pertains to the actions of Mr. Johnson constituting a disregard for the safety of others. The State argued it need not do so. As Appellant states, when the crime is vehicular assault, the *corpus delicti* rule requires the State to present independent corroborating evidence to show, on a *prima facie* level, (1) the victim’s injury, and (2) the defendant’s criminal act as a cause. *See Corbett*, 106 Wn.2d at 573-74; RCW 46.61.522(1)(c). The trial court shared this view, as it found that the violation of the statutes in RCW 46.61 constitutes *prima facie* of a criminal act.

Nonetheless, the trial court did find that, even without Mr. Johnson's statement that he was backing it into a driveway, the act of having the car positioned as it was at the time of the crash rose to the level of disregard for the safety of others. Mr. Johnson was in the car and it had been maneuvered to face perpendicular to the highway, halfway out into the lane of traffic. He put that car in that position. The Court found "The driving conduct of Mr. Johnson as I explained a few minutes ago constitutes disregard for the safety of others [...] clearly not a minor inadvertence or omission, it was given the location where it occurred. Stopping your vehicle and/or stopping and backing up your vehicle against the flow of traffic on a state highway is beyond ordinary negligence." RP 76 (emphasis added). The use of "and/or" shows that the court felt that "stopping your vehicle ... against the flow of traffic" met the disregard for the safety of others test. This Court should agree. It is hard if not impossible to imagine how putting a car in a position to be jutting straight out, perpendicular to the shoulder, halfway into the lane of travel could be anything other than disregarding the safety of others. If the car was parked that way, or stopped that way, the question would be easily answered. If Mr. Johnson was backing in, or trying to pull out, he did so in a way to

cause a truck to abruptly change lanes and another two to slam on their brakes, indicating he was not merging or yielding correctly.

APPELLANT POSITS SPECULATIVE REASONS WHY THE CAR'S
POSITIONING SUPPORTS A HYPOTHESIS OF INNOCENCE
WITHOUT ANY FACTUAL BASIS

The mere position of the Appellant's car, as well as descriptions from Ms. Barnes and Ms. Himley, corroborate his statement and provide *prima facie* evidence that a crime occurred. Yet Appellant argues there are innocent reasons for why the white car was where it was. The only possible innocuous explanation would be some sort of unavoidable distress. This is what trial counsel and the Appellant argue. But that should be rejected.

On this point, the Appellant's reliance on *Aten* actually undercuts the argument. In *Aten*, a baby died and the mother was charged with second degree manslaughter. At issue was the cause of death of the child. 130 Wn.2d 640. The State's theory was that the defendant has smothered her baby. But, a medical examiner performed an autopsy on Sandra and concluded that Sandra died of SIDS, which is acute respiratory failure. "He acknowledged suffocation could cause acute respiratory failure. But he also testified he could not determine in an autopsy whether acute respiratory failure was caused by SIDS or by suffocation." *Id.*, at 659.

Further, “Independent corroborating evidence shows Sandra had a simple viral upper respiratory infection on January 28, 1991.” *Id.* The court ultimately held that “since the independent evidence in this case supports a reasonable and logical inference or hypothesis of innocence, that is, that Sandra died of SIDS, that is not sufficient to establish the *corpus delicti*.” *Id.*, at 660.

But here, there is no evidence to support any possible innocuous explanation of why the Defendant’s car was in the lane of travel. Trial counsel attempted to make those same suggestions—“that car could be in the roadway because it had just been in an accident [...] It could be in the roadway because it broke down, those would be innocent conclusions, and the State has not proven it without Mr. Johnson's statements, how that vehicle ended up where it was.” PR 71. But, those suggestions were tossed out without any factual backing. And, without any corroborating evidence, the suggestions of trial counsel and appellant counsel beg the court to merely speculate in Mr. Johnson’s favor. The only explanations for why his car was the way it was support the State’s theory of a criminal act.

THE COURT DID NOT ADDRESS CAUSATION IN RULING ON
CORPUS DELICTI, BUT THE RECORD ESTABLISHES AMPLE
EVIDENCE OF CAUSATION

The Appellant suggests that “Although the independent evidence amply established that Ms. Barnes suffered substantial bodily harm, it did not establish that Mr. Johnson’s criminal act was the cause of that harm.” Appellant’s brief, 13. While the court may have ended the discussion of corpus at that point, it did address several other pieces of evidence which this court, reviewing the record, can find satisfy the *corpus delicti* question. On the issue of causation, the court discussed the string of events causing Ms. Barnes’s injury in rendering its verdict, and those facts are more than enough to satisfy the *corpus delicti* issue.

“The vehicle operated by Mr. Newport had a vehicle between him and where Mr. Johnson's vehicle was, and that vehicle abruptly changed lanes, at which time Mr. Newport was able to see the danger in front of him, and he applied his brakes suddenly and was able to stop his vehicle short of where Mr. Johnson's vehicle was at that time.” RP 84

“At about the same time that she saw this vehicle blocking the lane, Mr. Newport's brake lights came on, and that she then applied her brakes, she testified, as without delay, or without hesitation, and she believed that she reacted as quickly as she was able to do so” RP84-85
“She did the only thing she could, she applied her brakes, and she applied them as soon as she realized she was confronted with an emergency, she

applied her brakes. And so I find that the proximate cause of the collision the proximate cause of the injuries to Mrs. Barnes was the conduct of Mr. Johnson” RP 85.

Appellant provides no support for the premise that, in making a *corpus delicti* finding, a court must rule out intervening causes. Such a requirement seems contrary to the very low threshold required—*prima facie*. Nonetheless, as argued below, this Court should find no intervening cause in this case, just as the trial court did.

THE STATE PRESENTED SUFFICIENT EVIDENCE OF PROXIMATE
CAUSE TO CONVICT, AND THE COURT CORRECTLY FOUND NO
INTERVENING CAUSE

The State proved the causal connection between the Defendant's driving and the injuries suffered by Ms. Barnes. Looking to the pattern jury instruction as guidance, it requires that "the driving of a defendant [...] was a proximate cause of the resulting substantial bodily harm." WPIC 91.07. "Proximate cause" is further defined in the WPIC as "a cause which, in a direct sequence, unbroken by any new independent cause, produces the substantial bodily harm, and without which the substantial bodily harm would not have happened. There may be more than one proximate cause of substantial bodily harm." *Id. State v. Roggenkamp*, 153 Wn.2d 614, 631, 106 P.3d 196 (2005).

The trial court found the absence of the intervening cause as a conclusion of law. CP 25. The Court specifically found the following:

Ms. Barnes saw the white vehicle on the side of the road, appropriately had her foot on her brake, and applied her brakes without any delay or hesitation as soon as she saw Mr. Newport's F-350 apply its brakes. There is no basis to find that Ms. Barnes was following too closely or otherwise driving negligently. When confronted with an emergency that is no fault of one's own, and when a person so confronted with an emergency acts reasonably, such as applying brakes as soon as possible, that person's response is not a subsequent intervening cause. Mr. Newport acted reasonably in driving. Ms. Barnes acted reasonably in driving. There being no evidence of any other intervening causes, the Defendant's driving is therefore the proximate cause of this collision.

Id.

Conclusions of law are reviewed *de novo*. *State v. Roggenkamp*, 115 Wn. App. 927, 943, 64 P.3d 92 (2003); *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001).

Appellant argues that the State did not prove proximate causation because of Ms. Barnes “her conduct in failing to brake in time constituted a superseding intervening cause that broke the chain of causation.”

Appellant’s brief, 18. Further, Appellant states that “Ms. Barnes, on the other hand, was following too closely to Mr. Newport’s truck and did not apply the brakes of her car sufficiently quickly to avoid a collision.” Id., at

19. The conclusion made by the Appellant is that “Ms. Barnes should not have been following so closely to Mr. Newport’s truck that she could not stop her own car in time to avoid colliding with Mr. Newport’s truck. She should have applied her brakes immediately and taken defensive maneuvers when she saw Mr. Johnson’s car in the roadway so that she could avoid a collision.” Id. These claims by the Appellant were specifically rejected by the trial court, and are not supported by the testimony at trial.

Ms. Himley testified that Mr. Newport was driving at about 50 miles per hour. RP 16. A red truck in front of them jumped over a lane suddenly flashing brake lights, and Mr. Newport could not because of another car to his left. RP 16, 22. Mr. Newport slammed on his brakes “immediately” and missed hitting Mr. Johnson by a few feet. RP 14, 17-18.

Ms. Barnes drives the stretch of road where she was injured often, and her Ford Ranger was in good condition. RP 26. She was paying attention with no distractions. RP 27.

Ms. Barnes said she observed what turned out to be the Appellant’s white car on the roadway and she tapped her brakes, looked back at the freeway, and glanced back to see what traffic was around her. RP 28-29.

She then hit Mr. Newport's truck. RP 28. Asked if she had the change to fully apply her brakes, she could not remember, saying it all happened so fast. RP 29. There was nothing she could have done any quicker. RP 29.

Appellant suggests that this testimony shows Mr. Barnes was following too close. Instead, her testimony shows that she saw the Appellant's car was "out there very close to the line, edge of the highway, if not over it" (RP 27) and she was alert and covered her brakes. She then checked to see what traffic was around, as if she was looking for an escape route, and then Mr. Newport stopped suddenly and did not have time to dodge him. This is consistent with the theory that the Appellant was on the side of the road when seen by Ms. Barnes, and swung the front out into the road suddenly causing the red truck and Mr. Newport to brake. The court found "her testimony to be credible at that point. I beleive (sic) what she told me today, and I don't have any basis for concluding that she was following at an unsafe distance." RP 85.

Even if the evidence suggested that Ms. Barnes was following too close or too slow to slam on her brakes, that does not rise to the level of an intervening cause for the criminal case. While *Roggenkamp* deals with homicide, the legal question is similar. Contributory negligence is not a defense to negligent homicide. *Roggenkamp*, 115 Wn. App. at 945. It

therefore should not be a defense to vehicular assault, which is essentially negligent assault. “to escape liability, defendant would have to show contributory negligence was a supervening cause without which her negligence would not have caused the accident.” *State v. Judge*, 100 Wn.2d 706, 718, 675 P.2d 219, 226 (1984).

In *Roggenkamp*, the defendant was driving very fast through a residential neighborhood with another teenager also driving quickly. 115 Wn. App. at 933. Three other cars came to a four way stop. The first car was able to turn left and go with the flow of traffic with Roggenkamp and his friend. The second car, driven by a Ms. Carpenter was slammed into by Roggenkamp, who had slammed on his brakes and skidded more than 200 feet before hitting Ms. Carpenter’s car in the intersection. *Id.* Ms. Carpenter’s blood alcohol concentration was .013; she had been at a barbecue with the people in the other two cars. *Id.*, at 934.

Roggenkamp argued that “Ms. Carpenter's actions (driving with a 0.13 blood alcohol concentration and pulling out in front of Roggenkamp) were the superseding cause of the accident.” *Id.*, at 942. To be a superseding cause sufficient to relieve a defendant from liability, “an intervening act must be one that is not reasonably foreseeable. *Id.*, at 945. The *Roggenkamp* Court laid out three factors in determining whether an

intervening act is a superseding cause: whether the intervening act created a different type of harm, whether it constituted an extraordinary act, and whether the intervening act operated independently from the defendant's initial criminal act? *Id.* The court held that given the residential neighborhood in which he was driving, a car pulling out into traffic is something he should have reasonable foreseen. *Id.* Regarding the timing of Ms. Carpenter's drinking and pulling out in front of Mr. Roggenkamp, the court found "At most, Carpenter's actions were a concurring cause, not a superseding cause, of the accident. A concurring, as opposed to an intervening, cause does not shield a defendant from vehicular homicide." *Id.*, at 947.

The Supreme Court reviewed the *Roggenkamp* decision and agreed fully. "We have reviewed the Court of Appeals decision resolving this issue in favor of the State and find ourselves entirely in agreement with the decision and the reasoning that led to it. As the Court of Appeals pointed out, JoAnn Carpenter's actions were, at most, a concurring cause, not a superseding cause of the accident. A concurring cause does not shield a defendant from a vehicular homicide conviction." *Roggenkamp*, 153 Wn.2d at 630–31.

Applying the test in *Roggenkamp* to the case at hand, this Court can see that, even if the facts suggest Ms. Barnes was following too close, or did not press the brake quickly enough, it would not shield the Appellant as a defense. Mr. Johnson should reasonably expect traffic on the road to be moving quickly, and sometimes drivers do not leave enough braking distance. Further, because Ms. Barnes's position in traffic relative to Mr. Newport was already in place when the Appellant put his car in reverse and swung the front of it into traffic, it cannot be said to be a supervening cause.

Ms. Barnes was diligently driving, covering or tapping her brake when she first saw the Appellant's car, and then checking for surrounding traffic. She drove diligently and if she was slow to apply the brakes, such a lapse is not even on par with Ms. Carpenter's condition when driving. This court should agree with the trial court's conclusion of law finding that Ms. Barnes did the best she could driving her Ford that day. "I think the evidence supports a finding that she was confronted with an emergency, through no fault of her own, and when people are confronted with emergencies through no fault of their own, their duty is to act reasonably, and I believe that she acted reasonably. She did the only thing she could, she applied her brakes, and she applied them as soon as she realized she

was confronted with an emergency, she applied her brakes.” RP 85. This was reflected in the Court’s Conclusions of Law. CP 25.

IV. CONCLUSION

The drivers on Highway 12 on October 6, 2018, faced an emergency caused by the Appellant’s dangerous decision to alley-back his car into his driveway from the side of the road, in contravention to RCW 46.61.605. Mr. Newport and his passenger, Ms. Himley, and Ms. Barnes reacted as quickly as they could, but none were spared injury.

The State presented sufficient independent evidence to make a *prima facie* showing of vehicular assault given the way that the Appellant’s car was described by Ms. Himley and Ms. Barnes. Of all the possible reasons for the Appellant’s car to be positioned as it was, only backing into that driveway fits the facts—Ms. Barnes saw it on the side of the road apparently facing alongside traffic, but wasn’t sure if it was moving backwards, then a red truck darts out of the lane and Ms. Himley sees it perpendicular and halfway in the lane of travel, consistent with an alley-back maneuver. The trial court correctly determined that constituted a crime, later stated it constituted a disregard of the safety of others, and determined it caused the crash that led to Ms. Barnes’s injuries. The

Appellant asks instead for this court to speculate that maybe it had mechanical trouble, excusing the car and driver for being an obstruction.

Appellant also reads into Ms. Barnes's testimony that she was traveling too close to Mr. Newport's truck, could not stop her car in time to avoid the crash, and therefore her neglectful driving was an intervening cause of her injury. But, the evidence does not support that Ms. Barnes was driving neglectfully. In fact, her description of her thoughts and actions show she was an attentive driver who covered and applied her brakes and even checked the position of traffic as she approached where she had seen the Appellant's car on the side of the road. Even if she was unable to stop in time, the *Roggenkamp* decision sets a very high bar for what could constitute an intervening cause; the facts do not support such a finding.

The State respectfully requests this Court affirm the conviction.

DATED this __12th__ day of January, 2020.

Respectfully Submitted,

BY: 

RANDY J. TRICK
Deputy Prosecuting Attorney
WSBA # 45190

GRAYS HARBOR PROSECUTING ATTORNEY

January 12, 2020 - 10:49 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53189-5
Appellate Court Case Title: State of Washington, Respondent v. Matthew Steven Johnson, Appellant
Superior Court Case Number: 18-1-00330-2

The following documents have been uploaded:

- 531895_Briefs_20200112224737D2313510_5281.pdf
This File Contains:
Briefs - Respondents
The Original File Name was BRIEF OF RESPONDENT.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- ksvoboda@co.grays-harbor.wa.us
- lilajsilverstein@gmail.com
- maureen@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Randy Trick - Email: rtrick@co.grays-harbor.wa.us

Address:

102 W BROADWAY AVE RM 102

MONTESANO, WA, 98563-3621

Phone: 360-249-3951 - Extension 1622

Note: The Filing Id is 20200112224737D2313510