

FILED
Sept 12, 2011
Court of Appeals
Division III
State of Washington

No. 29768-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JONAS JACKSON KEYS, IV,
Defendant/Appellant.

APPEAL FROM THE KLINKITAT COUNTY SUPERIOR COURT
Honorable Brian P. Altman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact 1.10, 1.18, 1.19, 1.20, 1.21, 1.25, 1.27, 1.30 and 1.31, and Conclusion of Law II.

2. There was insufficient evidence to sustain the convictions of vehicular homicide.

3. The trial court erred in failing to enter written findings to support its conclusions of law that the elements of Counts III and IV (reckless endangerment) had been proven beyond a reasonable doubt.

4. The trial court erred in imposing community custody of 18 months as part of the sentence.

Issues Pertaining to Assignments of Error

1. Are the vehicular homicide convictions unsupported by substantial evidence in violation of Mr. Keys' right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

2. Where the trial court did not comply with CrR 6.1(d) by failing to enter written findings to support its conclusions of law that the elements of Counts III and IV (reckless endangerment) had been proven beyond a reasonable doubt, must the case be remanded for entry of findings?

3. Whether the crime of vehicular homicide committed under subsection (1)(c) of RCW 46.61.520 is a “violent offense” under the Sentencing Reform Act, for purposes of determining a defendant’s term of community custody.

B. STATEMENT OF THE CASE

Jonas Jackson Keys, IV, the defendant, was charged with two counts of vehicular homicide and two counts of reckless endangerment. CP 28–30; RCW 46.61.620(1)(b) or (c), RCW 9A.36.050(1). The vehicular homicide charges arose from the deaths of two passengers in a car driven by co-defendant Ronald Prominski, who crashed after unsuccessfully attempting to pass Mr. Keys. The reckless endangerment charges were based on the surviving passengers in the two cars. *See* below. The State did not charge under a theory of accomplice liability.

Mr. Keys waived his right to a jury trial, and the case proceeded to bench trial before the Honorable Brian P. Altman. CP 31–32; RP 8–482. The court found Mr. Keys guilty of the vehicular homicide counts under the theory of disregard for the safety of others and guilty of the reckless endangerment counts as charged. The court imposed a standard range sentence of 26 months for each vehicular homicide count and 6 months for each of the remaining counts, to run concurrently. CP 37, 29. The court

ordered a term of 18 months community custody. CP 39. This appeal followed. CP 52.

Christina Staples and Gretchen Parsons, both age 18 at the time, were driving around Klickitat a little after midnight on February 14, 2010, in Staples' 1991 Toyota Camry, "just wasting time". CP 46 at ¶ 1.3. The night was overcast and the pavement was damp with just kind of a mist on it. RP 14, 51, 78. Around 12:30 a.m., Staples and Parsons connected up with 22-year-old Mr. Keys and his 17-year-old passenger, Travis Atchley. Mr. Keys was driving his own car. CP 46 at ¶ 1.4; RP 198, 385.

For about an hour the four young people in the two cars drove around Klickitat playing a variety of "car games", described by Parsons as a mix of childhood games such as "hide and seek," "cat and mouse," and "tag," but played with cars. They would speed up and disappear, flash lights at each other, and follow each other in and out of town. In town there was no speeding. Out of town, speeds might be in excess of the speed limit, but not by much. The purpose of the games was to have fun. CP 46 at ¶ 1.6. Staples and Parsons described the overall interaction as playing "follow the leader", and did not involve passing each other. RP 83–84, 126–27, 410–11, 413.

At one point, Mr. Keys was the “leader” and headed out of town on State Route 142 towards the Ice Plant campground and Goldendale; the girls followed. RP 85–86, 202–03. Co-defendant Prominski¹ had been driving in town, with 19-year-old Levi Sanchez as his front seat passenger and 16-year-olds Dylan Johnson and William Alan Blake in the back seat. RP 232–34. Prominski and Sanchez saw the two cars chasing or following each other, and began following them out of town. RP 237–39. As Mr. Keys pulled out from a stop sign, he noticed a second pair of headlights behind him and was pretty sure it was Prominski’s car. RP 412–13.

Mr. Keys and the girls drove slightly over the speed limit of 30 to 40 miles per hour through a small residential area about a mile out of Klickitat called “Suburbia”. RP 87, 203, 240, 414. Staples and Parsons first noticed Prominski come up fast behind their car, tailing Staples through Suburbia. RP 86–87, 113, 127–28. Prominski came closer and closer to the rear of her car, revving his motor and edging to the left side of the lane as if trying to challenge her to a race or to pass her. RP 88, 114. Parsons assumed Prominski was going to join them in driving around,

¹ Prominski was 19 years old at the time. RP 232.

which would be normal because the town of Klickitat's too small and people get bored. RP 115, 120, 128.

On a straight stretch beyond Suburbia, Prominski pulled alongside Staples, whereupon she slowed to allow him to pass and pull in front of her. RP 88–89, 115. Staples was going 35 to 40 miles per hour, and may have tried to accelerate to 45 before slowing down again. RP 89, 240. Prominski passed her going 50 to 55 miles per hour and then followed behind Mr. Keys; Staples didn't try to keep up because her car had poor acceleration and would rattle if she went over 60 miles per hour. RP 85, 89, 116, 240.

The straightaway beyond Suburbia is a passing zone and continues about a quarter of a mile before the road curves. RP 205, 414–15. Prominski drove at 70 to 75 miles per hour and caught up to Mr. Keys, who was going 60 miles per hour. RP 241, 246, 418. When Prominski tried to pass, Mr. Keys put his gas pedal to the floor and “stomped on it” to keep him from doing so. RP 415, 428. Mr. Keys' car had 160,000 miles on it, and would only gradually speed up by flooring it or stomping on it. RP 406–07, 427.

Prominski didn't pass, and the two cars, now approaching the curves beyond Suburbia, slowed down and Prominski pulled back in

behind Mr. Keys. RP 415, 434. The approach to the Ice House campground involves a series of curves going slightly downhill with a final somewhat straight stretch, and is a no passing zone. RP 15; CP 47 at ¶1.24. Prominski stayed several car lengths behind and did not try again to pass Mr. Keys until after they began the approach to the campground. RP 415–416.

At the final curve before the straightaway, posted at 30 miles per hour, Mr. Keys was going 40 and Prominski was about a car length behind. RP 416, 429. Sanchez estimated Prominski was not going faster than 60 to 65 miles per hour as he drove through the curves behind Mr. Keys. RP 247, 252. Staples testified she saw some taillights here², although she couldn't tell whether they belonged to Mr. Keys or Prominski. RP 97. Sanchez said Prominski came out of the final curve going 60 to 65 miles per hour and decided to pass at the top of the downhill section where you can see for a distance that no other cars are coming. RP 242–43, 247, 252. Mr. Keys' passenger, Atchley, thought Prominski entered the oncoming lane earlier³ in the final curve. RP 207–

² Assignment of Error 1, ¶ 1.18. The court's finding is not supported by this witness' testimony.

³ Assignment of Error 1, ¶ 1.25. Atchley and Sanchez (Prominski's passenger) differed in their recollection of when Prominski began to make this second pass.

08. Mr. Keys sped up coming out of the curve to 55 or 65 miles per hour.

RP 416, 419, 247–48.

Mr. Keys did not expect Prominski to pass and when he pulled into the oncoming lane Mr. Keys slowed down slightly and stayed in his lane and pulled over to the right as far as he could. RP 416–17, 432. Mr. Keys intended to let Prominski pass him. RP 421, 433.

Sanchez said as soon as Prominski turned into the left/oncoming lane to pass, they hit a bump or dip in the road causing them to immediately lose control of the car because the car suspension bottomed out. RP 242–44. When Prominski was attempting to pass, the front of his car appeared to reach Mr. Key's back passenger door or at least past the rear bumper. RP 421–22, 244. Mr. Keys and Atchley saw the headlights from Prominski's car in the oncoming/passing lane a couple of seconds; by the time Mr. Keys looked away from the mirror to focus on the road and then back, he had lost sight of him. RP 211–12, 422, 439. Mr. Keys was not altogether surprised that Prominski might try to pass in that area because a person can see a ways out on the downhill slightly curving "straightaway" and oncoming car headlights would be visible at night. RP 420–21, 429–30.

Mr. Keys and Atchley thought that Prominski was playing games with them by turning off his lights, as he'd done before, and continued driving. RP 212–13, 438. They eventually pulled over when they saw Staples' lights behind them, and when Staples arrived the four realized something may have happened. They all drove back to the campground area, where they saw Prominski's car on fire in a ditch. RP 91–92, 138, 213–16. Prominski's passengers, Johnson and Blake⁴, died as a result of injuries sustained in the wreck. CP 33.

Washington State Patrol Trooper Mark Boardman testified for the State as an expert in the field of collision reconstruction. RP 9, 13. His role was not to make speed determinations but to reconstruct how Prominski's Acura (car that crashed) got from the roadway to its final place of rest. RP 29, 65. The roadway from Klickitat approaching the Ice House campground is bordered by a guard rail on the river side and a high bank rising up from the roadway with a narrow drainage ditch on the opposite side. RP 15. The approach to the campground involves a series

⁴ In its Findings of Fact and Conclusions of Law, the Court concludes as to Count II, that the defendant's driving proximately caused injury to William Alan Blake, but mistakenly states that Dylan Earl Johnson was the person who had died. Assignment of Error 1, Conclusion of Law II at 2. Count II: 2.b and 2.d (CP 49–50). This appears to be a scrivener's error.

of curves going slightly downhill with a final somewhat straight stretch, and is a no passing zone. RP 15; CP 47 at ¶1.24. Trooper Boardman testified that in his opinion the driver of the Acura was on the somewhat straight stretch of road when he pulled into the oncoming lane to pass, caught a tire in dirt alongside the edge of the road, and overcorrected and veered across the lanes behind Mr. Keys whose car was continuing on in the original direction. The Acura slid along the end of the guardrail, struck a boulder and a tree, and finally came to rest down an embankment near the entrance to the campground. RP 24–27, 33–34, 58–59, 64–65, 70. The trooper found no evidence of any contact damage on the driver’s side of Mr. Keys’ car. RP 77.

Mr. Keys acknowledged he was speeding that night, but he’d lived in the area all his life and believed he was driving safely, he maintained his car, had good, fairly new tires, knew his car could handle the road conditions, was aware he had a passenger in the car and didn’t exceed his comfort zone RP 405–06, 417. He’d driven this road many times, in both directions. RP 417, 433–35. When asked if the dip in the road had surprised him, Mr. Keys said kind of and that he’d never really noticed it. RP 435.

Trooper Boardman testified the roadway where Prominski lost control had no bumps or irregularities, and that the reduction of grade there is fairly smooth. RP 74–75. He has driven the lanes in that area at speeds around 60 miles per hour and they can be navigated at higher than the posted speed limit. RP 76–76.

After the bench trial, the court entered written findings of fact and conclusions of law. CP 45–51. In pertinent part, the following findings were entered:

...

1.10 Once Prominski joined the group, they all immediately left Klickitat heading towards Goldendale on State Route 142 (“SR 142”). Keys was in the lead, followed by Staples. Prominski was third in line.

...

CP 46.

1.18 ... Staples never saw their taillights again until the Ice House straightaway.

1.19 With Prominski’s entry into the game, the game changed. Prominski challenged Keys to a speed game or contest. Keys readily accepted the challenge.

1.20 Prominski then tried to pass Keys, still on the straight stretch just past Suburbia, in a passing zone. Keys put his gas pedal to the floor to keep Prominski from passing him and “stomped on it.” He knew Prominski would not be able to pass him if he got to the curves.

1.21 Prominski’s front bumper got to Keys’ passenger door, but Keys sped up, thwarting the pass.

...

1.25 As Keys exited [the] last curve before the Ice House entrance, at about mile post 15, he accelerated to at least 60 miles per hour. As Keys entered the first straightaway, Prominski had already

started to make his move, having started to pass well back in the curve. ...

CP 47.

...

1.27 Everyone was clearly engaged. They were not driving along at the speed limit talking about girls or sports or cars. They were speeding, music blaring, not talking, going fast.

...

1.30 Neither Keys nor Atchley were surprised by Prominski's abrupt passing attempt.

1.31 In the second or two before Prominski's car lost control, Keys' car passed over the dip in the road. While Prominski's passing attempt did not surprise Keys, the dip did. Keys has traveled this road presumably hundreds of times. He has lived in Goldendale or Klickitat all his life. He testified he had never noticed the dip before. A reasonable inference is that he has never before traveled over the dip that fast.

CP 48.

In pertinent part, the court entered conclusions of law as follows:

II. Viewing all of the facts relevant to the incident – the time of night, the wet roads, the speed of the defendant's driving, the thwarted passing event a few minutes prior, the continued game-playing by the defendant – Mr. Keys was Driving with Disregard for the Safety of Others. And there is a direct, unbroken, causal connection between the Defendant's Driving with Disregard for the Safety of Others with the deaths that occurred that night.

...

CP 49.

II. 2. Count II: 2.b That the defendant's driving proximately caused injury to William Alan Blake; ...

2.d That Dylan Earl Johnson died within three years as a proximate result of the injuries.

CP 50.

C. ARGUMENT

1. The vehicular homicide convictions are unsupported by substantial evidence and violate Mr. Keys' right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.⁵

a. Due process requires proof of all elements of vehicular homicide by disregard beyond a reasonable doubt. As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in Winship: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” Winship, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499

⁵ Assignment of Error 1, Conclusion of Law II.

P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the 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. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency

admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491, 670 P.2d 646.

b. Insufficient evidence of disregard for the safety of others. The court convicted Mr. Keys of vehicular homicide under the theory of operating a motor vehicle with disregard for the safety of others. Under this prong, the State must prove an aggravated kind of negligence, "falling short of recklessness but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term 'negligence.'" State v. Eike, 72 Wn.2d 760, 765-66, 435 P.2d 680 (1967). "[D]isregard for the safety of others is conduct more culpable than 'driving in such a manner as to endanger or be likely to endanger any persons or property' (RCW 46.61.525–negligent driving)." State v. Lopez, 93 Wn. App. 619, 623, 970 P.2d 765 (1999) (quoting with approval Eike,

72 Wn.2d at 779 (Donworth, J., dissenting)). Some evidence of a defendant's conscious disregard of the danger to others is necessary to support a charge of vehicular homicide. State v. Vreen, 99 Wn. App. 662, 672, 994 P.2d 905 (2000), citing Lopez, 93 Wn. App. at 623.

The State failed to prove Mr. Keys drove with disregard for the safety of others, as the evidence did not show his actions exceeded ordinary negligence. Under RCW 46.61.400(1)⁶, drivers must drive at no greater speed than is reasonable and prudent for the conditions, and speed must be controlled so as to avoid collisions. The failure to follow the rules of the road is admissible but not conclusive on the issue of negligence. RCW 5.40.050⁷ (abolishing the doctrine of negligence per se); Lopez, 93 Wn. App. at 622-23; Mathis v. Ammons, 84 Wn. App. 411, 418, 928 P.2d 431 (1996), *rev. denied*, 132 Wn.2d 1008 (1997).

⁶ RCW 46.61.400 provides as follows: “(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.”

⁷ RCW 5.40.050 provides as follows: “A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to: (1) Electrical fire safety, (2) the use of smoke alarms, (3) sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of disease, as required under RCW 70.54.350, or (4) driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.”

Mr. Keys does not disagree that he may have driven in a negligent manner, one that endangered or could have endangered others. RCW 46.61.525—negligent driving; *see Lopez*, 93 Wn. App. at 623. He disputes, however, that the State proved more than ordinary negligence. The evidence demonstrated nothing extraordinary or grossly negligent about his driving. There was no evidence of alcohol or drug use. Mr. Keys had driven on SR 142 many times, and he was driving as he always did. He was familiar with the straight stretches, passing lanes and curves in the roadway, had a well-maintained car with good, fairly new tires, knew his car could handle the misted road conditions, was aware he had a passenger in the car and didn't exceed his comfort zone RP 14, 51, 78, 405–06, 417, 433–35. There was no evidence to dispute that Mr. Keys remained in his lane of travel at all times, with full control of his vehicle.

The trial court found that Prominski “joined the group” as Mr. Keys and Staples left Klickitat on SR 142, that his entry “changed the game”, that Prominski thereafter challenged Mr. Keys to a speed game and that Keys “readily accepted the challenge”. Assignment of Error 1, ¶¶ 1.10, 1.19. This is pure speculation. Prominski was not part of the follow the leader game around town (RP 134) and there was no evidence he'd ever participated in any late night driving get-togethers around town.

Passing cars had never been part of the get-together activities. And there was no evidence Prominski asked to join Mr. Keys and Staples in their travels, or that either one encouraged him to participate. Prominski simply began following on his own. He chose to pass Staples' car, and pulled back in front of her as a reasonable driver would on a two-lane road.

Prominski had grown up and gone to school in the area and presumably was familiar with this straight stretch and the fact it was a passing zone. RP 194–95, 232–33. It is unsupported conjecture to view his attempt to pass Mr. Keys as some sort of a challenge, rather than a driver's simple decision to pass another car in light of favorable circumstances. The trial court characterized Mr. Keys' successful acceleration as "thwarting"⁸ the attempted pass, intimating he now wanted to play a passing game. Far too many of us drivers have had exactly the same experience of entering a passing lane only to have the driver in front of us speed up to prevent passing, and few of us would interpret it as an invitation to "dance". One failed attempt to pass is not evidence that Mr. Keys was participating in any game with Prominski.

⁸ Assignment of Error 1, ¶¶ 1.20, 1.21 and Conclusion of Law II.

The court found that “everyone was clearly engaged”—presumably meaning Mr. Keys and Prominski—because they were speeding. Assignment of Error 1, ¶ 1.27. However, Washington cases affirming vehicular homicide convictions based on the “disregard” theory are uniform in requiring more than just speed; there must be evidence of significant disregard of the driving rules of the road, which are designed to ensure public safety. For example, in State v. Brooks, 73 Wn.2d 653, 659, 440 P.2d 199 (1968), evidence was sufficient to support the “disregard” theory where on a night with wind and heavy rain, the defendant was driving at a high rate of speed on the wrong side of the highway, rounded a curve and collided head on with an oncoming automobile. Similarly, in Eike, 72 Wn.2d at 766, the defendant driver rounded a sweeping curve of the highway at 45 to 50 miles per hour on a rainy night and crossed the center line into the path of an oncoming car. In State v. Barefield, 47 Wn. App. 444, 459, 735 P.2d 1339 (1987), *aff’d*, 110 Wn.2d 728, 756 P.2d 731 (1988), evidence showed the defendant's speeding car had crossed the center line into the path of an oncoming car, knocking the car backward and lifting it up into the air. Likewise, in State v. Knowles, 46 Wn. App. 426, 430-31, 730 P.2d 738 (1986), evidence was sufficient to convict on the “disregard” theory when defendant, despite the urgings of his

passengers to slow down, took a “blind” curve at 22 miles per hour over the posted limit of 35, crossed the center line, and struck an oncoming car.

Here, there was no evidence of wrongdoing beyond speeding. The trial court suggests that Mr. Keys was likely going faster than he testified to, because Mr. Keys hadn’t noticed the “dip” in the road before. Assignment of Error 1, ¶ 1.31. When asked if the dip in the road had surprised him, Mr. Keys said kind of and that he’d never really noticed it. RP 435. The State’s own witness, Trooper Boardman, testified the roadway where Prominski lost control had *no* bumps or irregularities, and that the reduction of grade there is fairly smooth. RP 74–75. He has driven the lanes in that area at speeds around 60 miles per hour and they can be navigated at higher than the posted speed limit. RP 76–76. Whether a change in gradation or dip or bump, the roadway surface was presumably well known to all local drivers, including Prominski. He was driving with three passengers, and Mr. Keys was not responsible for Prominski’s decisions to drive over the speed limit and to attempt passing in a no-pass zone.

And there was no evidence of “continued game-playing” by Mr. Keys. Assignment of Error 1, Conclusion II. The court suggests that Mr. Keys and Atchley expected Prominski to try to pass again, as part of the

supposed game. Assignment of Error 1, ¶ 1.30. Atchley was not asked what he felt, if anything, when Prominski drove into the oncoming lane as if to pass them. Mr. Keys did say he was not altogether surprised that Prominski might try to pass in that area because a person can see a ways out on the downhill slightly curving “straightaway” and oncoming car headlights would be visible at night. RP 420–21, 429–30. It is conjecture for the court to twist Mr. Keys’ unambiguous comment to fit its unfounded concept of game-playing.

Once he became aware Prominski was attempting to pass him in the final curve before the campground, Mr. Keys did not accelerate and instead pulled over to his right as far as possible to allow Prominski some extra room. Mr. Keys intended to let Prominski pass him. RP 416–17, 421, 432–33. Instead, Prominski made the choice to attempt to pass at this curve and unfortunately hit something in the roadway causing his car to collide with the guardrail, and resulted in a fiery crash with tragic impact.

The total facts do not establish that Mr. Keys drove with conscious disregard for the safety of others. And the State did not charge and could not prove accomplice liability because there was no evidence of any encouragement to drive in a grossly negligent manner. *Cf. State v. Parker*, 60 Wn. App. 719, 806 P.2d 1241 (1991) (reckless driving). The evidence does not support any conclusion other than that Prominski made independent

driving decisions that night, which resulted in tragic consequences. The State failed to prove all elements of the crime and the convictions must be reversed.

c. Insufficient proof of causation. To sustain a conviction for vehicular homicide based upon operating a vehicle with disregard for the safety of others, the State must also prove a proximate causal link between the defendant's misconduct and the accident which results in another's death. State v. Gantt 38 Wn. App. 357, 359, 684 P.2d 1385 (1984). A defendant's actions need not be the sole proximate cause of a victim's injury. State v. Neher, 112 Wn.2d 347, 350–52, 771 P.2d 330 (1989). Proximate cause is a cause which in direct sequence, unbroken by any new, independent cause, produces the event complained of and without which the injury would not have happened. Id., citing Bernethy v. Walt Faylor's, Inc., 97 Wn.2d 929, 935, 653 P.2d 280 (1982).

Before criminal liability is imposed, the conduct of the defendant must be both (1) the actual cause, and (2) the “legal” or “proximate” cause of the result. State v. Rivas, 126 Wn.2d 443, 453, 896 P.2d 57 (1995), citing 1 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 3.12, at 392 (1986). When the independent intervening act of a third person was one which was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then there is a break in the

causal connection between the defendant's negligence and the plaintiff's injury. State v. McAllister, 60 Wn. App. 654, 660, 806 P.2d 772 (1991), citing Qualls v. Golden Arrow Farms, Inc., 47 Wn.2d 599, 602, 288 P.2d 1090 (1955). In McAllister, the defendant driver made a slow speed turn during which the victim who had also been drinking fell out of the side van door onto the pavement, and fatally hit her head. McAllister's conviction for vehicular homicide by intoxication was reversed because the victim's negligence was a superseding cause of death.

Here, Mr. Keys and his car was not the actual cause of the victims' death. As discussed above, Prominski had never been part of the car games in the town of Klickitat. "Passing cars" was never part of the games. Suddenly that night, Prominski appeared out of nowhere and attempted to pass Mr. Keys in a passing zone. There was no game. Mr. Keys simply sped up to prevent him from doing so, and the two cars slowed down to navigate the upcoming curves. Mr. Keys had no cause to reasonably anticipate that Prominski would attempt to pass a second time, and certainly no reason to think Prominski would attempt it in a no passing zone. As in McAllister, Prominski's negligence if not recklessness was a superseding cause of death. Any causal link, which Mr. Keys disputes, between Mr. Keys' driving and the crash of Prominski's car was thereby

broken, and the conviction for vehicular homicide based upon operating a vehicle with disregard for the safety of others must be reversed. Gantt 38 Wn. App. at 359.

2. The trial court's failure following a bench trial to enter written findings of fact to support its conclusions of law that the elements of Counts III and IV had been proven beyond a reasonable doubt requires remand.

CrR 6.1(d) requires that written findings of fact and conclusions of law be entered after a bench trial. State v. Head, 136 Wn.2d 619, 621–22, 964 P.2d 1187 (1998). The purpose of this rule is to enable effective appellate review. Id. at 662. Absent written findings of fact and conclusions of law, an appellant cannot properly assign error and this Court cannot review whether the findings of fact and conclusions of law are supported by the record. *See e.g.*, Mairs v. Dep't of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993) (appellant court only reviews whether findings of fact are supported by substantial evidence and whether the findings of fact support the conclusions of law); State v. Reynolds, 80 Wn. App. 851, 860 n.7, 912 P.2d 494 (1996) (error cannot be predicated on trial court's oral findings).

The court's oral findings are not binding and cannot replace written findings of fact and conclusions of law. Head, 136 Wn.2d at 622. The appellate court should not have to comb through oral rulings to determine if appropriate findings were made, nor should an appellant be forced to interpret oral rulings. Id. at 624.

The proper remedy for the failure to enter written findings of fact and conclusions of law under CrR 6.1(d) is remand to the trial court for entry of findings. Head, 136 Wn.2d at 622. Assuming written findings are ultimately entered herein, reversal will be required if the delay prejudices Mr. Keys. Id. at 624–25. Mr. Keys is entitled to the opportunity to offer further argument depending on the content of the relevant written findings.⁹

⁹ Because a trial court's failure to enter written findings of fact and conclusions of law may prejudice an appellant, there is a "strong presumption that dismissal will be the appropriate remedy." State v. Smith, 68 Wn. App. 201, 209–11, 842 P.2d 494 (1992). Where prejudice to the defendant can be shown, the proper remedy for failure to comply with CrR 6.1(d) is not remand, but reversal. Head, 136 Wn.2d at 624.

3. The defendant's current offense of vehicular homicide committed under subsection (1)(c) of RCW 46.61.520 is not a "violent offense" under the Sentencing Reform Act and thus only one year of community custody is authorized for the offense under RCW 9.94A.701, the statute authorizing community custody.

Sentencing is a legislative power, not a judicial power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. State v. Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law and reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980).

a. The Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, does not define the crime of vehicular homicide by disregard for the safety of others as a violent offense. The statute authorizing the superior court to impose a sentence of community custody is RCW 9.94A.701, which provides in pertinent part:

...

(2) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

...

RCW 9.94A.701(2). Chapter 9.94A RCW, defines “violent offense” as:

(a) Any of the following felonies:

(i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;

...

(xiv) Vehicular homicide, when 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.

RCW 9.94A.030(54) (emphasis added).

Mr. Keys’ crime of vehicular homicide by disregard for the safety of others is a class A felony. RCW 46.61.520(2). Thus, it satisfies the statutory definition of violent offense under subsection (i). RCW 9.94A.030(54)(a)(i).

However, Mr. Keys' crime is not included as a violent offense under subsection (xiv). RCW 9.94A.030(54)(a)(xiv). There are three types of vehicular homicide, all currently class A felonies. RCW 46.61.520. Subsection (xiv) lists the first two types, homicide by intoxication and recklessness, but does not include the third type, homicide by disregard. RCW 9.94A.030(54)(a)(xiv). In State v. Stately, 152 Wn. App. 604, 216 P.3d 1102 (2009)¹⁰, Division II applied principles of statutory construction and ultimately concluded that the omission was intentional and vehicular homicide by disregard was not a "violent offense".

Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*—specific inclusions exclude implication. If we read the statute to define vehicular homicide by disregard as a violent offense simply because it is a class A felony, then subsection (xiv) would be superfluous. We presume, however, that the legislature does not include superfluous language and we interpret statutes to give meaning to each section.

More importantly, when there is "an 'inescapable conflict' between a statute's general and specific terms, the specific terms prevail." Here, it is impossible to harmonize the statute's terms in subsection (i) with its terms in subsection (xiv). The later subsection, relating specifically to vehicular homicide, is more specific than subsection (i), which relates generally to all class A offenses. Applying the specific-general doctrine, the specific terms of subsection (xiv)

¹⁰ Review denied, 168 Wn.2d 1015, 227 P.3d 852 (2010).

prevail and Stately's vehicular homicide by disregard conviction is not a violent offense.

Stately, 152 Wn. App. at 608-610 (citations omitted). Here, because the crime of homicide by disregard is not a violent offense, the sentencing court was not authorized to impose 18 months of community custody under RCW 9.94A.701(2).

b. Because Mr. Keys' current offense was not a violent offense, his community custody range was improperly set at 18 months. The statute authorizing the superior court to impose a sentence of community custody, RCW 9.94A.701, further provides in pertinent part:

...
(3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:

(a) Any crime against persons under RCW 9.94A.411(2);

...
RCW 9.94A.701(3)(a). Vehicular homicide is classified as a “crime against persons”. RCW 9.94A.411(2). Thus, the statutorily authorized term of community custody is one year. Mr. Keys’ sentence should be reversed and his case remanded for resentencing within the proper provisions of RCW 9.94A.701.

D. CONCLUSION

For the reasons stated, this Court should reverse the convictions for vehicular homicide and remand for resentencing and entry of written findings regarding Count II.

Respectfully submitted September 12, 2011.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 12, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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