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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,

Respondent,

v.

JONAS JACKSON KEYS, IV,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Honorable Brian P. Altman, Judge
Superior Court No. 10-1-00118-4

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether, after assuming the truth of the State's evidence and all reasonable inferences therefrom, the defendant's Vehicular Homicide and Reckless Endangerment convictions were supported by sufficient evidence.

2. Whether imposition of eighteen months community custody was appropriate under the Sentencing Reform Act, 9.94A RCW.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Dylon Earl Johnson and William Alan Blake, both sixteen years old, were killed in a car crash in the early morning hours of February 14, 2010. Both boys were passengers in a car driven by Ronald P. Prominski, who survived the crash along with his front passenger, Levi Sanchey. The defendant in this case, Jonas Jackson Keys, IV, was driving a separate vehicle and was alleged to have been racing with Prominski at the time of the crash. Mr. Keys' car escaped the incident unscathed. He and his passenger, Travis Atchley, were unharmed. The defendant was charged by Amended Information with two counts of Vehicular Homicide for the deaths of Dylon Earl Johnson (Count I) and William Alan Blake (Count II) and two counts of Reckless Endangerment for causing a substantial risk of death or serious bodily injury

to Levi Sanchey (Count III) and Travis Atchley (Count IV). CP 28-30. The defendant waived his right to a jury trial and was tried before the Honorable Brian P. Altman starting February 9, 2011. CP 31-32, 1RP 6. The court found Mr. Keys guilty of both counts of Vehicular Homicide, Disregard for the Safety of Others. Mr. Keys was also found guilty of both counts of Reckless Endangerment. CP 64, 3RP 508. This appeal followed.

B. SUBSTANTIVE FACTS

In the wee, small, damp hours of February 13 and 14, 2010, two cars were killing time in the little town of Klickitat, Washington, playing games such as "cat and mouse" and "follow the leader." 1RP 109-110[1]. In one car were Gretchen Parsons and Christina Staples. Ms. Staples was driving. *Id.* In the other car were Jonas Jackson Keys, IV, and his passenger, Travis Atchley. *Id.* They drove around town, at times heading a ways out of town and back again. *Id.* As she followed Mr. Keys out of

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[1] Citations to the verbatim report of proceedings are to the transcripts filed with the Court of Appeals in the appeal of State of Washington v. Jonas Jackson Keys, IV COA No. 29768-3-III. The various volumes of transcripts will be cited as follows:

1RP	February 09, 2011	3RP	February 10, 2011 Vol. II
2RP	February 10, 2011 Vol. I	4RP	February 14, 2011, March 7, 2011 and March 9, 2011

town in the early hours of February 14, 2010, Ms. Staples and Ms. Parsons noticed Ronald P. Prominski coming up fast behind them. 1RP 88. In the car with Mr. Prominski were Levi Sanchey in the front, and Dylon Earl Johnson and William Alan Blake in the rear. 1RP 16-17, 2RP 245. Almost immediately, Prominski started challenging Staples, revving his engine, moving closer and closer to the rear of her car and moving farther and farther into the oncoming lane. 1RP 88. As Ms. Staples slowed to allow him to pass, he roared around her, closing the distance between his vehicle and that of Mr. Keys. 1RP 88-89. Before the two vehicles sped out of sight, Ms. Staples and Ms. Parsons saw Prominski engage Mr. Keys with the same kind of challenging behavior he had exhibited with them. 1RP 99, 116, 121. Mr. Prominski caught up with Mr. Keys on a straight stretch and tried to pass him. Rather than slow down as Ms. Staples had done, Mr. Keys "stomped on it," pushing his gas pedal to the floor. 4RP 427-428. Mr. Keys wanted to prevent Mr. Prominski from passing. 4RP 433. He was able to stay in front of Mr. Prominski into the Ice House curves, where Mr. Keys knew Mr. Prominski wouldn't be able to pass. 3RP 366, 4RP 427-428. About halfway into the last Ice House curve, in a no passing zone, Mr. Prominski moved into the oncoming lane in a second attempt to pass. 2RP 207-210. Coming out of the curve, where the speed limit was

forty miles per hour, the defendant accelerated to between sixty and sixty-five miles per hour. 2RP 243, 4RP 419. Mr. Prominski also accelerated, still trying to pass, but was only able to get about a foot from Mr. Keys' bumper. 2RP 210, 244. Mr. Keys passed over a dip in the road without incident, although he noted later that it had kind of surprised him, going at that speed. 3RP 341. Prominski was not so lucky. When he passed over the dip, his suspension "bottomed out," causing him to lose control of his vehicle. 2RP 242-243. It spun around, ricocheted off of the guardrail on the opposite side of the road and careened backwards off a steep embankment, slamming into a tree. 1RP 64-65. The back end of the vehicle collapsed into the rear passenger area. *Id.* Mr. Johnson and Mr. Blake died shortly afterwards from their injuries. CP 59.

III. ARGUMENT

A. THE DEFENDANT'S CONVICTIONS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Evidence was sufficient to convict the defendant of two counts of Vehicular Homicide and two counts of Reckless Endangerment. Evidence is sufficient to support a conviction if the evidence permitted the trier of fact to find that each element of the crime was proven beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 221–222, 616 P.2d 628 (1980). All reasonable

inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin,* 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). In a bench trial, the trial court's findings of fact and conclusions of law must be sufficient to suggest the factual basis for the ultimate conclusion. *State v. Banks,* 149 Wn.2d 38, 43, 65 P.3d 1198 (2003) (citing *State v. Head,* 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)).

The defendant's convictions must be affirmed because there is substantial evidence in the record to support the challenged findings and because those findings support the challenged conclusion of law.

1. The Court's Findings of Fact were Supported by Substantial Evidence in the Record.

Specifically, Mr. Keys assigns error to findings of fact 1.10, 1.18[2], 1.19[3], 1.20, 1.21, 1.25, 1.27, 1.30 and 1.31. Brief of Appellant at 1, (Assignment of Error 1). "On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. The party

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[2] In the corrected Findings of Fact and Conclusions of Law, CP 59-65, this finding is misnumbered as 1.19 but will be referred to throughout as 1.18 to remain consistent with the Brief of Appellant and the trial court's oral ruling.

[3] In the corrected Findings of Fact and Conclusions of Law, CP 59-65, this finding is misnumbered as 1.17 but will be referred to throughout as 1.19 to remain consistent with the Brief of Appellant and the trial court's oral ruling.

challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Unchallenged factual findings are verities on appeal. *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The trial court is entitled to draw all fairly deducible inferences from the evidence. *State v. Tocki*, 32 Wn. App. 457, 461, 648 P.2d 99 (1982). Deference is given to the trier of fact who resolves conflicting testimony, evaluates witness credibility and decides the persuasiveness of material evidence. *State v. Walton,* 64 Wn. App. 410, 824 P.2d 533 (1992)(citing *State v. Longuskie,* 59 Wn. App. 838, 844, 801 P.2d 1004 (1990)). Refusal to base a finding on testimony which is inherently improbable or unpersuasive or which contains discrepancies or inconsistencies is not impermissibly arbitrary. *Tocki*, 32 Wn. App. at 461. While testimony supporting the trial court's finding in this case may have been disputed by other witnesses, the court clearly resolved the conflict in favor of the identified witnesses' version of events. The court's oral decision may be considered in interpreting findings of fact. *State v. White*, 31 Wn. App. 655, 644 P.2d 693 (1982).

a. Finding of Fact 1.10

Finding 1.10 states "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 60.

Levi Sanchey, the surviving passenger in Ron Prominski's vehicle, testified :

> Mr. Matosich: "Where did -- where did you and Mr. Prominski go when you were following Mr. Keys and Ms. Staples?"
> Mr. Sanchey: "Out of town."
> Mr. Matosich: "Did you follow them around town, or just straight out of town?"
> Mr. Sanchey: "Straight out of town…"
> Mr. Matosich: "Okay. Who was in the lead as you were going out of town?"
> Mr. Sanchey: "J.J."

2RP 239. This testimony is sufficient to support finding 1.10.

b. Finding of Fact 1.18

Finding 1.18 states "After Prominski passed Staples, the cars driven by Keys and Prominski accelerated away from Staples. In this stretch of highway, the speeds of Keys' and Prominski's cars reached somewhere between 60 and 75 miles per hour. Staples tried to keep up with them,

driving between 60 and 65 miles per hour, but steadily lost ground. Staples never saw their taillights again until the Ice House straightaway." CP 61.

The testimony of Christina Staples, Gretchen Parsons, and Travis Atchley support this finding:

> Ms. Staples: "After he passed me, he pulled back into the right lane. And from there they both accelerated away . . . "
> Ms. Mathews: "Do you remember telling Det. Ortner that you thought that Ron was going at least 60 when he -- passed you?"
> Ms. Staples: "I do . . . [h]e was going faster than I was and I figured it was at least 60."
> Ms. Mathews: "Okay. You said he pulled away from you pretty fast, right?"
> Ms. Staples: "Yeah."
> Ms. Mathews: "And were you trying for a while to keep up with Mr. Prominski and with Mr. Keys?"
> Ms. Staples: "I wasn't trying to keep up with them. I was trying to keep them in my sights but not trying to keep up with them."
> Ms. Mathews: "Okay. And why was it you were not trying to keep up with them, if you were playing follow the leader?"
> Ms. Staples: "My car couldn't go that fast."
> Ms. Mathews: "Okay. So, you said you -- they went around a corner and that's when you lost them?"
> Ms. Staples: "Yes."
> Ms. Mathews: "Okay. Let's take it from there. Did you ever see their tail lights again?"
> Ms. Staples: "Not until the point I got pretty much right there by the ice house, and the only pair of tail lights I seen was at the end of the

> straight stretch, which I assumed was Ron."
> Ms. Mathews: "And so, between Suburbia and that L-curve, before you went around that L-curve, was there any time that you again saw their tail lights?"
> Ms. Staples: "No."

1RP 89-90, 97. Ms. Parsons testified that Ms. Staples was traveling sixty to sixty-five miles per hour in attempting to keep up with Mr. Prominski and the defendant. *See* 1RP 116. Mr. Atchley testified that the defendant, with Mr. Prominski trailing him, reached a maximum speed of seventy to seventy-five miles per hour between Suburbia and the Ice Plant Hill. *See* 2RP 206. Mr. Sanchey also estimated that Mr. Prominski and the defendant were traveling at approximately seventy to seventy-five miles per hour prior to reaching the curves. 2RP 241. Finding 1.18 is supported by substantial evidence in the record.

c. Finding of Fact 1.19

Finding 1.19 states "With Prominski's entry into the game, the game changed. Prominski challenged Keys to a speed game or contest. Keys readily accepted the challenge." CP 61.

This finding is supported in part by direct testimony and in part by reasonable inferences drawn from that testimony.

Ms. Staples testified that she felt Mr. Prominski was "challenging her" either to pass or to race. 1RP 88. He was "revving his engine . . . coming closer and closer to [her] tail end, and moving further and further to the left side of the lane." *Id.* She saw Mr. Prominski exhibit the same behavior towards the defendant after he sped past her vehicle. 1RP 99.

Ms. Parsons testified that she thought the game changed when Mr. Prominski joined the group.

> Ms. Mathews: "You thought that the game had changed. What made you think that that game changed?"
> Ms. Parsons: "Because Ron was trying to pass J.J., and then would slow down and get back and then try to pass him."
> Ms. Mathews: "And he couldn't pass him?"
> Ms. Parsons: "No. It didn't look like he was -- he was trying but he wasn't trying at the same time. Like he'd get right next to J.J., and then slow down and then get back up next to J.J."
> Ms. Mathews: "So that was after they'd passed you at Suburbia that was going on?"
> Ms. Parsons: "Yeah . . . [a]fter he had already passed us then he started -- trying to pass J.J., or trying to edge J.J. on; I'm not sure."
> Ms. Mathews: "But -- But the two of them kept going and they were – they were going at some speed at that time."
> Ms. Parsons: "Yeah."

1RP 121. The defendant admitted at trial that he intentionally prevented Mr. Prominski's first attempt to pass him, which occurred in a legal passing

zone. He stated he did this by "stomp[ing] on it" - - pushing his gas pedal to the floor - - because he wanted to stay in front of Mr. Prominski. *See* 4RP 427-28, 433. Also admitted at trial was the defendant's statement to law enforcement that he knew if he could get into the Ice House curves Mr. Prominski wouldn't be able to pass him. 3RP 366, 4RP 427-428. The reasonable inference from this testimony is that the defendant both understood and readily accepted Mr. Prominski's challenge. This finding is supported by substantial evidence in the record.

d. Finding of Fact 1.20

Finding 1.20 states "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." CP 61.

This finding is well supported by the same testimony that supports Finding 1.19.

e. Finding of Fact 1.21

Finding 1.21 states "Prominski's front bumper got to Keys' passenger door, but Keys sped up, thwarting the pass." CP 61.

The finding that the defendant sped up and successfully thwarted Mr. Prominski's pass is supported by the same testimony that supports Findings 1.19 and 1.20. Additionally, this finding is supported by the defendant's trial testimony and statements to law enforcement admitted at trial that Mr. Prominski's front bumper reached his passenger door. See 3RP 361-362, 4RP 421. Finding 1.21 is supported by substantial evidence in the record.

f. Finding of Fact 1.25

Finding 1.25 states "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 into the curve." CP 61. This finding is supported by the combined testimony of Mr. Sanchey, who was Mr. Prominski's passenger, and Mr. Atchley, who was riding with the defendant. Mr. Sanchey testified that he estimated that Mr. Prominski, still trailing the defendant, was traveling at sixty or sixty-five miles per hour coming out of the last curve before the Ice House entrance[4]. 2RP 243. Mr. Atchley testified that Mr. Prominski was traveling in the oncoming lane on top of Ice House Hill and had attempted to pass the defendant as soon as he

[4] The defendant testified that he was traveling fifty-five or sixty miles per hour coming out of

slowed down for the last curve. *See* 2RP 206-208. Finding 1.25 is supported by substantial evidence.

g. Finding of Fact 1.27

Finding 1.27 states "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." CP 62.

The fact that "everyone was clearly engaged" is a reasonable inference drawn from the other facts contained in this finding, which are supported by the testimony of Mr. Atchley, Mr. Sanchey, and the defendant.

As already noted, substantial evidence supports the finding that the defendant was traveling at least sixty miles per hour coming out of the last curve before the Ice House entrance. The defendant admitted that the speed limit coming out of that last curve was forty miles per hour. 3RP 327.

The defendant told officers in the statement admitted at trial that he had a stereo system in his car and had it turned up so loud he was unable to hear Mr. Prominski's engine as he tried to pass. *See* 3RP 352. The defendant didn't remember Mr. Atchley saying anything to him during Mr. Prominski's

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the last curve before the Ice House entrance. See 4RP 419.

final attempted pass. 3RP 365. After the defendant sped up, he believed Mr. Atchley "knew what he was going to try to do." *Id.* Finding 1.27 is supported by substantial evidence in the record.

h. Finding of Fact 1.30

Finding 1.30 states "Neither Keys nor Atchley were surprised by Prominski's abrupt passing attempt." CP 62.

The defendant testified that he was not surprised by Mr. Prominski's passing attempt. *See* 3RP 344-345, 4RP 434. Mr. Atchley testified in great detail about Mr. Prominski's final effort to pass the defendant. He did not note any surprise or disbelief while relaying the step by step progression of that passing attempt, which occurred in a no-passing zone in the middle of a curve on a hill. 2RP 207-211, 220, 224-225, 229. That fact, combined with the defendant's testimony that Mr. Prominski had been close on his tail ever since he had thwarted an earlier attempt, led the court to the reasonably infer that Mr. Atchley was not surprised by Mr. Prominski's second attempt to pass. This is evidenced by the court's oral ruling.

> Neither Mr. Keys nor Mr. Atchley were surprised about the abrupt passing attempt. This is the best evidence, credible evidence. And how could they be? They had just thwarted Mr. Prominski's pass earlier. Mr. Prominski had been behind them, if not tailgating then fairly close, through the curves.

4RP 494-495. Finding 1.30 is supported by substantial evidence in the record.

i. Finding of Fact 1.31

Finding 1.31 states "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 that he had never noticed the dip before. A reasonable inference is that he has never before traveled over the dip that fast." CP 62.

The defendant told officers in a statement admitted at trial that the dip kind of surprised him going at that speed and that he had never really noticed it before. 3RP 341. At trial, he testified that he had traveled that road too many times to count, 4RP 433-434, and that he was born in Goldendale and had lived in Klickitat all of his life. 4RP 405. These facts, and the reasonable inference drawn from them, are supported by substantial evidence in the record.

2. The Court's Findings of Fact Provide a Sufficient Factual Basis for each of the Elements of the Conclusions of Law.

The defendant argues that there was insufficient evidence to enter Conclusion of Law II, convicting him of Counts I and II. Brief of Appellant at 1 (Assignment of Error 2). He also alleges that the court failed to enter findings of fact sufficient to support Counts III and IV. Brief of Appellant at 1 (Assignment of Error 3).

To withstand a challenge to the sufficiency of the evidence, challenged conclusions must be supported by findings of fact separately stating the factual basis for the legal conclusions as to each element of the crime. *State v. Greco*, 57 Wn. App. 196, 787 P.2d 940 (1990). The defendant's convictions must be affirmed because Counts I through IV of Conclusion of Law II are supported by the Findings of Fact and because those Findings are supported by substantial evidence in the record.

a. Count I: Vehicular Homicide, Dylon Earl Johnson.

Count I states that the following elements were proven by a reasonable doubt, making the defendant guilty of Vehicular Homicide with Disregard for the Safety of Others for the death of Dylon Earl Johnson. CP 63.

i. Element 1.a

Element 1.a states "that on or about February 14, 2010,

the defendant drove or operated a motor vehicle." CP 63. This conclusion is supported by Findings of Fact 1.4 and 1.5. CP 60.

ii. Element 1.b

Element 1.b states "that the defendant's driving proximately caused injury to Dylon Earl Johnson." CP 63. This conclusion is supported by Findings of Fact 1.10-1.33. CP 60-62.

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. *State v. Gantt*, 38 Wn. App. 357, 359, 684 P.2d 1385 (1984) (quoting *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982)). To be an independent cause sufficient to relieve a defendant from liability, an intervening act must be one that is not reasonably foreseeable, i.e. one which the defendant should not have anticipated as reasonably likely to happen. *State v. Roggenkamp,* 115 Wn. App. 927, 945-946, 64 P.3d 92 (2003), *affirmed*, 153 Wn.2d 614106 P.3d 196 (2005). If the cause is not reasonably foreseeable then there is a break in the causal connection between the defendant's negligence and the plaintiff's injury, and the intervening act is the superseding cause of that injury. *Id.*

In *State v. Escobar*, 30 Wn. App. 131, 132, 633 P.2d 100 (1981), the defendant and his companion, Ayon, were driving home in their own separate

vehicles after a day of swimming and drinking beer at the Yakima River. *Id.* Witnesses reported that both vehicles were traveling at excessive speeds and were continually passing each other until they were out of sight. *Id.* While attempting to pass Escobar, Ayon collided with a vehicle in the oncoming lane and was killed. *Id.* This court held that Escobar's driving was a proximate cause of the injury suffered by Ayon.

> Had Mr. Escobar not been racing, or had he been going at the legal rate of speed instead of accelerating, the opportunity for the passing car to pull back into the proper lane of travel prior to the collision would have been greatly enhanced and the accident avoided. The accident reconstruction expert indicated that because of the parties' excessive speeds, Mr. Escobar's rapid acceleration on Mr. Ayon's right, cutting off escape, and the split-second reaction times involved at those speeds, a collision became inevitable the moment Mr. Ayon began to pass. Upon this basis, we hold the court could find Mr. Escobar's driving was a proximate cause of the collision and the ensuing death. Because Mr. Escobar was racing, Mr. Ayon could not avoid the collision and died.

Escobar, 30 Wn. App. at 139. The facts in *Escobar* are nearly indistinguishable from the facts in this case. Findings 1.10-1.33 recite that Mr. Keys and Mr. Prominski were traveling at speeds well above the speed limit and that when the fatal crash occurred, Mr. Prominski was traveling in the oncoming lane in a second attempt to pass Mr. Keys, who failed to slow

and allow him to pass. But for this behavior, the crash would not have occurred. It is also clear from the findings that Mr. Prominski's attempt to pass was forseeable - - Mr. Keys was not surprised by Mr. Prominski's second attempt to pass him. These facts clearly support the conclusion that Mr. Keys' driving was the proximate cause of the injury to, and resulting death of, Dylon Earl Johnson.

iii. Element 1.c

Findings of Fact 1.10-1.33, CP 60-62, support Element 1.c; "that at the time of causing the injury, the defendant was driving the motor vehicle with disregard for the safety of others."

"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 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).

Disregard for the safety of others has been found in cases where: the defendant was driving at high speeds on a windy and dark night with heavy rain falling, *State v. Brooks*, 73 Wn.2d 653, 440 P.2d 199 (1968), the defendant was driving at excessive speeds with an undersize tire on his

vehicle after consuming intoxicating liquor, *State v. Coates*, 17 Wn. App. 415, 563 P.2d 208 (1977), the defendant was driving on the wrong side of the road, *State v. McNeal*, 98 Wn. App. 585, 991 P.2d 649 (1999), and where a defendant was racing with another vehicle, both vehicles traveling at high rates of speed and continually passing each other. *Escobar,* 30 Wn. App. 131.

Mr. Keys' driving is arguably more dangerous than was that of Mr. Escobar. He was racing in the middle of a "pitch dark and overcast" night on roads that were "either damp or wet." CP 60. In *Escobar*, this Court noted that evidence that Escobar and his companion were traveling at speeds up to eighty to ninety miles per hour and were continually passing each other supported the trial court's inference that the two cars were engaged in racing behavior. This Court affirmed the trial court's conclusion that Escobar was driving with disregard for the safety of others at the time of the crash. *Escobar*, 30 Wn. App. at 136, 138-139. As in *Escobar*, the defendant's actions in this case clearly exceeded ordinary negligence. "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." CP 63.

iv. Element 1.d

Element 1.d states "that Dylon Earl Johnson died within three years as a proximate result of the injuries." CP 63. This conclusion is supported by Finding of Fact 1.1. CP 59.

v. Element 1.e

Element 1.e states "that the defendant's act occurred in the State of Washington." CP 63. This conclusion is supported by Finding of Fact I, "[t]he following events took place in Klickitat County Washington." CP 59.

b. Count II: Vehicular Homicide, William Alan Blake.

Count II states that the following elements were proven by a reasonable doubt making the defendant guilty of Vehicular Homicide with Disregard for the Safety of Others for the death of William Alan Blake.

i. Element 2.a

Element 2.a states "that on or about February 14, 2010, the defendant drove or operated a motor vehicle." CP 63. This conclusion is supported by Findings of Fact 1.4 and 1.5. CP 60.

ii. Element 2.b

Element 2.b states "that the defendant's driving proximately caused injury to William Alan Blake." CP 64. This conclusion is supported by Findings of Fact 1.10-1.33, CP 60-62, under the same analysis applied to section 1.b, above.

iii. Element 2.c

Element 2.c states "that at the time of causing the injury, the defendant was driving the motor vehicle with disregard for the safety of others." CP 64. This conclusion is supported by Findings of Fact 1.10-1.33, CP 60-62, under the same analysis applied to section 1.c, above.

iv. Element 2.d

Element 2.d states "that William Alan Blake died within three years as a proximate result of the injuries." CP 64. This conclusion is supported by Finding of Fact 1.1. CP 59.

v. Element 2.e

Element 2.e states "that the defendant's act occurred in the State of Washington." CP 64. This conclusion is supported by Finding of Fact I, "[t]he following events took place in Klickitat County Washington." CP 59.

c. Count III: Reckless Endangerment, Levi Sanchey.

Count III charges that the elements of Reckless Endangerment

of Levi Sanchey were proven beyond a reasonable doubt.

i. Element 3.a

Element 3.a states "that on or about February 14, 2010, the defendant acted recklessly." CP 64. This conclusion is supported by Findings of Fact 1.10-1.33. CP 60-62.

A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. RCW 9A.08.010. Findings 1.10-1.33, CP 60-62, provide the factual basis for the conclusion that Mr. Keys disregarded a substantial risk that a wrongful act could, and did, occur, and that his conduct amounted to a gross deviation from that which a reasonable person would exercise in the same situation. He was driving up to thirty-five miles per hour over the speed limit in the middle of an overcast night on wet roads pushing his accelerator to the floor to avoid being passed by a car driving in the oncoming lane. Finding 1.19 specifically states "Prominski challenged Keys to a speed game or contest. Keys readily accepted the challenge." CP 61. Comparisons or contests of speed are per se reckless. *See* RCW 46.61.530. Element 3.a is supported by the Findings of Fact.

ii. Element 3.b

Element 3.b states "that such reckless conduct created a substantial risk of death or serious physical injury to Levi M. Sanchey." CP 64. This conclusion is supported by Finding of Fact 1.8 and 1.33. CP 60, 62.

Mr. Sanchey was the sole surviving passenger in Mr. Prominski's car. Clearly, the defendant's reckless conduct created a substantial risk of death or serious physical injury to Levi Sanchey.

iii. Element 3.c

Element 3.c states "that the defendant's act occurred in the State of Washington." CP 64. This conclusion is supported by Finding of Fact I, "[t]he following events took place in Klickitat County Washington." CP 59.

d. Count IV: Reckless Endangerment, Travis Atchley.

i. Element 4.a

Element 4.a states "that on or about February 14, 2010, the defendant acted recklessly." CP 64. This conclusion is based on Findings of Fact 1.10-1.33, CP 60-62, under the same analysis applied to element 3.a, above.

ii. Element 4.b

Element 4.b states "that such reckless conduct created a substantial risk of death or serious physical injury to Travis Atchley." CP

64. This conclusion is supported by Findings of Fact 1.5 and 1.10-1.33. CP 60-62.

Mr. Atchley was the defendant's passenger. Fortunately for him and for the defendant, Mr. Keys did not lose control of his vehicle. They were, however, traveling at the same speed as Mr. Prominski, if not faster, in an attempt to prevent a pass. The defendant's recklessness created a substantial risk of death or serious bodily injury to Travis Atchley. This element is supported by the Findings.

iii. Element 4.c

Element 4.c states "that the defendant's act occurred in the State of Washington." CP 64. This conclusion is supported by Finding of Fact I, "[t]he following events took place in Klickitat County Washington." CP 59.

3. Any Error in the Findings of Fact and Conclusions of Law is Harmless Error.

Insufficiency of findings of fact and conclusions of law from a bench trial is subject to a harmless error analysis. *Banks,* 149 Wn.2d at 43. The test is whether "there is a reasonable probability that the outcome of the trial would have been different had the error not occurred . . . . A reasonable probability exists when confidence in the outcome of the trial is undermined."

Banks, 149 Wn.2d at 44 (quoting *State v. Powell,* 126 Wn.2d 244, 267, 893 P.2d 615 (1995)). A review of the evidence at trial and the Court's oral ruling makes clear that any error as to any of the challenged findings of fact and conclusions of law is harmless error as the outcome of the trial would not have been different.

Because each element of each count in Conclusion of Law II has a factual basis in the Findings of Fact, and because the challenged findings of fact are supported by substantial evidence in the record, the trial court did not err in entering Conclusion of Law II. Any error this court may find was clearly harmless. The defendant's convictions must be affirmed.

B. REMAND IS REQUIRED TO CORRECT THE COMMUNITY CUSTODY PROVISION OF THE JUDGMENT AND SENTENCE.

The State agrees that the Vehicular Homicide with Disregard for the Safety of Others is classified as a "crime against persons," and not as a "violent offense" under the Sentencing Reform Act. Mr. Keys' community custody term should have been limited to twelve months pursuant to RCW 9.94A.701(3)(a) and remand is required to impose the correct term of community custody.

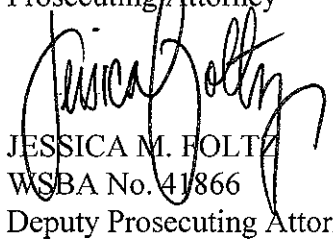
IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that Mr. Keys' convictions be affirmed and that he be remanded to allow for the imposition of the correct term of community custody.

DATED November 28, 2011.

Respectfully submitted,

LORI LYNN HOCTOR
Prosecuting Attorney



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COURT OF APPEALS OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Plaintiff, v. JONAS JACKSON KEYS, IV, Defendant.	COURT OF APPEALS NO. 29768-3-III DECLARATION OF MAILING

I, Jessica M. Foltz, state that on November 28, 2011, I sent a copy of the Brief of Respondent in this case to: Susan Marie Gasch at gaschlaw@msn.com. Email service was per agreement.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28 day of November, 2011.

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