

FILED
Court of Appeals
Division III
State of Washington
1/23/2018 11:22 AM

No. 35071-1-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

TANA J. CHAVEZ, Appellant.

BRIEF OF RESPONDENT

BENJAMIN C. NICHOLS
Asotin County
Prosecuting Attorney
WSBA #23006

P. O. Box 220
Asotin, Washington 99402
(509) 243-2061

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PREFACE	iii
I. SUPPLEMENTAL STATEMENT OF THE CASE	1
II. ISSUES	3
A. <u>IS THE INFORMATION IN THIS CASE CONSTITUTIONALLY DEFICIENT</u>	3
B. <u>DID THE TRIAL COURT HAVE SUFFICIENT EVIDENCE TO SUPPORT ITS FINDING OF “PARTICULARLY VULNERABLE VICTIM”</u>	3
III. ARGUMENT	3
A. <u>THE INFORMATION FILED IN THIS CASE CONTAINS A SUFFICIENT STATEMENT TO AFFORD NOTICE OF THE CHARGE THEREIN</u> .	13
B. <u>THE RECORD AND LAW SUPPORT THE TRIAL COURT’S FINDING OF “PARTICULARLY VULNERABLE VICTIM” IN THIS CASE</u>	7
IV. CONCLUSION	12

TABLE OF AUTHORITIES

State Supreme Court Cases

State v. Cardenas, 129 Wn.2d 1, 10, 914 P.2d 57, 61
(1996) 8

State v. Champoux, 33 Wash. 339, 74 P. 557 (1903) 4

State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117
(1986) 8

State v. Rivas, 126 Wn.2d 443, 451, 896 P.2d 57
(1995) 6, 7

State v. Suleiman, 158 Wn.2d 280, 291, 143 P.3d
795, 800 (2006) 9

State Court of Appeals Cases

State v. Thomas, 57 Wn. App. 403, 788 P.2d 24
(1990), *review denied*, 115 Wn.2d 1003, 795 P.2d
1155 (1990) 8

Statutes

RCW 46.61.520(1)(a) 4

Court Rules

GR 14.1(a) 8

PREFACE

The Appellant has provided an insufficient statement of the case and “Facts” to allow for full consideration of this matter. Most notably absent from the Appellant’s recitation is any mention of the incident which immediately preceded the fatal incident. This incident was significant in the proceedings herein and is included in the Defendant’s Submission of the Stipulated Facts (Clerk’s Papers page 25, *hereinafter* CP 25), upon which the trial court based its verdict. The Respondent respectfully submits the following additional facts drawn from the record in this regard.

I. SUPPLEMENTAL STATEMENT OF THE CASE

On the day prior to the fatal incident, on August 28, 2016 Asotin County Undersheriff¹ Scott Coppess was called to the scene of a disturbance involving the Appellant, Tana J. Chavez. CP 24, page 3; (see also CP 24, page 000016 of attached police reports). Undersheriff Coppess located the Appellant near the residence of the reporting party and observed that she appeared to be intoxicated. *Id.* At the time of the contact the Appellant was leaning against a large Dodge Ram pickup truck. *Id.* The Appellant told the Undersheriff that she had been drinking “a lot” of vodka in her truck. *Id.* She claimed that she had been doing so while the of the truck was parked, and denied that she had driven the truck while impaired. *Id.*

Undersheriff Coppess, along with another officer, helped the Appellant into his patrol vehicle and provided her with a citizen’s assist ride home. *Id.* The Undersheriff asked the Appellant for the keys to her truck, for safekeeping and to prevent the Appellant from driving while she was impaired. *Id.* He told the Appellant that he would leave her keys at the Asotin County Jail. *Id.* He said that she could pick them up the following day, and that she needed to be sober when she did so. *Id.*

¹ The Defendant’s Submission of Stipulated Facts refer to Undersheriff Coppess as “Deputy” and “Officer” (Clerk’s Papers, (*hereinafter* CP) 24, page 3), in facts, Scott Coppess is the Undersheriff for Asotin County: CP 24, page 000016 of attached police reports.

On August 29, 2016 at approximately 12:44 pm the Appellant appeared at the Asotin County Jail to retrieve the keys to her truck. CR 24, page 3; (see also CP 24, page 000018 of attached police reports). The Corrections Officer on duty verified the Appellant's identification and turned the keys to her truck over to her. *Id.*

Less than six hours later, at approximately 6:20 pm on August 29, 2016 Officer of the Clarkston Police Department and medics were called to the intersection of Sixth Street and Chestnut Street, in Clarkston, Asotin County Washington. CP 24, page 2. They responded and found the victim, Charles Mingus had been struck by the Appellant's Dodge Ram pickup truck. *Id.*

For the most part the Appellant provides an accurate description of the fact of the case from this point forward.

II. ISSUES

- A. IS THE INFORMATION IN THIS CASE CONSTITUTIONALLY DEFICIENT?
- B. DID THE TRIAL COURT HAVE SUFFICIENT EVIDENCE TO SUPPORT ITS FINDING OF "PARTICULARLY VULNERABLE VICTIM"?

III. ARGUMENT

- A. THE INFORMATION FILED IN THIS CASE CONTAINS A SUFFICIENT STATEMENT TO AFFORD NOTICE OF THE CHARGE THEREIN.
- B. THE RECORD AND LAW SUPPORT THE TRIAL COURT'S FINDING OF "PARTICULARLY VULNERABLE VICTIM" IN THIS CASE.

DISCUSSION

- A. THE INFORMATION FILED IN THIS CASE CONTAINS A SUFFICIENT STATEMENT TO AFFORD NOTICE OF THE CHARGE THEREIN.

The Appellant's first assignment of error is: "The charging document for Vehicular Homicide was constitutionally deficient." Appellant's Opening Brief, (hereinafter: Appellant's Brief) at page 5. To support this argument the Appellant first points out that the Information filed in this matter does not contain the qualifying statement that the death of the victim occurred "within three years" of his injuries at the hands of the Appellant. While it is true that the

statute which defines Vehicular Homicide does contain this language², the Appellant does not provide any support for her claim that this is a fatal flaw in this particular case.

Over one-hundred years ago our State Supreme Court provided the definitive answer to this sort of assertion. In State v. Champoux, 33 Wash. 339, 74 P. 557 (1903), an appellant claimed that a charging document which did not include the language asserting that the death occurred “within three years” of the injuries, was thus, rendered fatally flawed. *Id.* at 346-347. The Court responded:

But, in any event, the phraseology criticized is not material; for the information informs the accused that the mortal wounds from which Lottie Brace died were inflicted on the 5th day of November, 1902, and the information is dated on the 8th day of November, 1902, three days after. So that it must necessarily follow that the death occurred within three days from the infliction of the wounds. The information in all respects seems to be sufficient to sustain the judgment.

Id. In the present case the charging document informed the Appellant that the injuries which proved to be the “mortal wounds” were inflicted on “the 29th day of August 2016.” Information, CP 1. The Information was filed on August 31, 2016 - two days from the infliction of the wounds. The date of the injury and the date of the filing of the Vehicular Homicide both plainly appear on the face of the charging

² RCW 46.61.520(1)(a).

document. It cannot be argued that a three day interval between the injury and filing of the charge in Champoux, *supra*, satisfies the notice requirement that death occurred within three years, but a two day interval in the present case will not.

The Appellant's argument is not supported by any case law and is contrary to well-settled legal precedent.

The Appellant's next attack on the charging document is utterly frivolous. On page 7 of the Appellant's Brief, the Appellant provides the exact language of the Information:

That on or about the 29th day of August 2016, in Asotin County, Washington, the Defendant operated a motor vehicle while under the influence of alcohol or drugs, and this conduct was the proximate cause of injury which caused the death of Charles J. Mingus.

The Appellant then asserts that this language does not assert that "death was a proximate cause of injury." Appellant's Brief, at page 7. This is correct. A victim's DEATH is NEVER a proximate cause of the victim's INJURY. This argument is utterly without merit.

The Appellant then continues this misguided foray pointing out that the charging document does not expressly assert that "injury was a proximate cause of being under the influence of being under the influence of intoxicants." *Id.* This too is a correct observation and equally meritless. The reason is that the law has never required that the "injury was a proximate cause of being under the influence..." The law is clear and again, well settled:

The Legislature did state, however, as clearly as possible, that the only causal connection which the State is required to prove is the connection between the act of driving and the accident.

State v. Rivas, 126 Wn.2d 443, 451, 896 P.2d 57 (1995).

The Appellant's final assault on the charging document in this vein is similarly factually, legally, and logically impecunious. The Appellant asserts that the Information "does not indicate that injury was a proximate cause of the driving a motor vehicle." Appellant's Brief at page 7. This is true, because the dead man's "injury" did not cause the Appellant to drive her vehicle. It boggles the mind to think that this argument could even be considered. If, what the Appellant meant was that the charging document "does not indicate that the Appellant's driving of a motor vehicle was a proximate cause of the victim's injuries," this too falls well short of the mark.

As the Appellant points out the Information in this case indicates that the Appellant's "conduct was the proximate cause of the injury[.]" Appellant's Brief at page 7. The Appellant tries to argue that the word conduct as used in this instance is "impermissibly vague." *Id.* One cannot help but note that the only "conduct" described at any point in the Information is: "operated a motor vehicle." Nowhere in the language of the charging document is any other type of "conduct" described. Again, returning to Rivas supra, at 451, "the only causal

connection which the State is required to prove is the connection between the act of driving and the accident.”

In the present case the State asserted that the Appellant’s act of driving, or “conduct,” was the proximate cause of the injuries which caused the death of Charles Mingus. This was stipulated by the parties and found by the court. This is legally sufficient. The charging document is not flawed in any manner.

B. THE RECORD AND LAW SUPPORT THE TRIAL COURT'S FINDING OF "PARTICULARLY VULNERABLE VICTIM" IN THIS CASE.

The Appellant asserts that the Court’s imposition of an exceptional sentence is not supported by the facts or the law as applicable to the present case. In an effort to make ground in this argument, the Appellant first asserts that there was no evidence that she knew that the victim was particularly vulnerable. What the Appellant fails to mention is the actual law on this point. This is most likely because the courts have soundly rejected this argument every time it was attempted.

Perhaps the most comprehensive dismissal of claims like that attempted by the Appellant herein, can be found in an unpublished opinion out of Division I, on April 26, 2004. That opinion will not be

cited as precedent (mindful of GR 14.1(a)³), but therein the Court did cite to recognized to precedential authorities. Among these authorities is State v. Cardenas:

Finally, we turn to the trial court's conclusion that the victim was particularly vulnerable. We have previously established that a pedestrian victim of a vehicular assault may be considered particularly vulnerable, being unable to take evasive action and not having the protection of being in another vehicle. State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986). A pedestrian is even more vulnerable when she has no reason to suspect that she may be in imminent danger. See State v. Thomas, 57 Wn. App. 403, 788 P.2d 24 (*upholding exceptional sentence based on victim vulnerability where defendant sped through parking lot, hitting unsuspecting pedestrian*), review denied, 115 Wn.2d 1003, 795 P.2d 1155 (1990).

State v. Cardenas, 129 Wn.2d 1, 10, 914 P.2d 57, 61 (1996), and:

The trial court made no specific findings regarding whether Cardenas knew or should have known of a risk to pedestrians. Nonetheless, it is apparently undisputed that the incident occurred in a residential area, and there is no reason to suppose Cardenas did not know this. It is also reasonable to assume that given this, Cardenas either knew or should have known that there would be people such as the victim here, totally unprepared and vulnerable, when he drove recklessly through this area careening finally into the victim's own backyard.

Cardenas, 129 Wn.2d at 12.

³ Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. GR 14.1(a)

In the present case the Appellant stipulated to, and the Trial Court found, that the victim was a ninety year old “pedestrian” in a motorized wheelchair marked with an orange flag. Defendant’s Submission of Stipulated Facts, CP 25, ¶1 - 2. Similarly, the Appellant stipulated to, and the Trial Court found that the victim was crossing at a marked crosswalk and had a “walk” sign in his favor at the time that he was run over by the Appellant. *Id.* at ¶ 2.

These facts far exceed those relied on by the Cardenas Court when it held that the mere fact that the accident occurred in a residential neighborhood was sufficient to meet the “knew or should have known” standard. As our Supreme Court has noted, even without the extreme vulnerabilities such as those of Mr. Mingus - 90 years old, wheelchair bound, crossing in a marked crosswalk, with the “Walk” sign in his favor, the standard is met:

While none of these specific vulnerabilities is present, this court has recognized that a vehicular assault victim can be particularly vulnerable where the victim was relatively defenseless.

State v. Suleiman, 158 Wn.2d 280, 291, 143 P.3d 795, 800 (2006).

The Appellant’s next assertion is that there is “insufficient evidence that Mr. Mingus was *particularly* vulnerable.” Appellant’s Brief at page 11, (*emphasis in original*). As discussed above, the mere fact that the victim was an unsuspecting pedestrian is sufficient

to support a finding of particular vulnerability. In the face of this strong legal precedent the Appellant argues:

The head trauma sustained seems likely to have resulted in death regardless of whoever may be present in the crosswalk.

Appellant's Brief at page 12. This position is not premised on any evidence that was presented to the court, not in the stipulated facts, not in the supporting documents, nor in the evidence presented during any hearing. Rather, the Appellant relies on supposition, a vague reference to a police report, and to Defense counsel's closing argument at the hearing on the exceptional sentence.⁴

Contrary to the Appellant's wholly unsupported argument, the sentencing court, with the benefit of the actual evidence presented in the form of the stipulated facts, and the accompanying documents, and the testimony and exhibits admitted into evidence during hearings, specifically found that:

The victim in this matter was particularly vulnerable based upon the following:

- (a) He was an elderly man (90 years old);
- (b) His eyesight and hearing were impaired;

⁴ The Appellant cites to "CP 64." This appears to be page of a police report that was submitted in support of the State's case. It is an incident report by an officer that includes the following observation: "Based on observations by on scene medics who said it was unlikely Mingus was going to survive the trauma to his head, I requested WSP to assist with the investigation." This cannot possibly construed as evidence that "an able-bodied person in the same position would not have succumbed to injuries in the same way that Mr. Mingus did." At page 12.

- (c) His balance and reactions were impaired;
- (d) His mobility was very limited and he had to move about in a scooter;
- (e) The family had selected the color red for the scooter for safety purposes;
- (f) The scooter was equipped with an orange warning flag for safety purposes;
- (g) The victim's family had developed a "path of travel" for safety purposes for the victim to include marked crosswalks at intersections with traffic lights and curb cuts - the victim was following this route when he was struck by the Defendant and killed;
- (h) At the time that the victim was struck he was crossing a city street in daylight hours in a marked crosswalk with a "Walk" light in his favor.

Findings of Fact and Conclusions of Law for an Exceptional Sentence, CP 104 - 105.

A set of specific and definitive findings based upon actual evidence admitted at trial must surely carry more weight than conjecture premised upon Defense Counsel's argument. It seems incredulous that one would even try to argue that a 90 year-old man, suffering from impairments to eyesight and hearing; his balance and reactions similarly impaired; with mobility limited to such an extent that he had to move about in a scooter; was not impaired to such a level as to make him particularly vulnerable. The sentencing court did not err in so finding.

IV. CONCLUSION

The charging document was not flawed. It contained all of the necessary elements and was sufficient as a matter of law. The sentencing court properly considered the evidence and stipulated facts and found that victim was particularly vulnerable. The law supports the court's finding that the Appellant knew or should have known of Mr. Mingus' vulnerability. The Appellant's argument that there is "no evidence" that he was not particularly vulnerable is absolutely contrary to the record. In fact, it is the Appellant's position that lacks even a scintilla of evidentiary support.

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

Dated this 23rd day of January, 2018.

Respectfully submitted,



BENJAMIN C. NICHOLS, WSBA #23006
Attorney for Respondent
Prosecuting Attorney For Asotin County
P.O. Box 220
Asotin, Washington 99402
(509) 243-2061

**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,
Respondent,

v.

TANA J. CHAVEZ,
Appellant.

Court of Appeals No: 35071-1-III

DECLARATION OF SERVICE

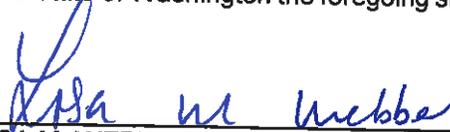
DECLARATION

On January 23, 2018 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

SEAN M. DOWNS
sean@greccodowns.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on January 23, 2018.


LISA M. WEBBER
Office Manager

**DECLARATION
OF SERVICE**

ASOTIN COUNTY PROSECUTOR'S OFFICE

January 23, 2018 - 11:22 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35071-1
Appellate Court Case Title: State of Washington v. Tana Jo Chavez
Superior Court Case Number: 16-1-00141-8

The following documents have been uploaded:

- 350711_Briefs_Plus_20180123112216D3391981_8206.pdf
This File Contains:
Affidavit/Declaration - Service
Briefs - Respondents
The Original File Name was Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- sean@greccodowns.com

Comments:

Sender Name: Lisa Webber - Email: lwebber@co.asotin.wa.us

Filing on Behalf of: Benjamin Curler Nichols - Email: bnichols@co.asotin.wa.us (Alternate Email:)

Address:
135 2nd Street
P.O. Box 220
Asotin, WA, 99402
Phone: (509) 243-2061

Note: The Filing Id is 20180123112216D3391981