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State of Washington
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COA No. 36817-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELIZABETH L. TURNER-MURPHY,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The State's evidence was insufficient to support the conviction.

Issue Pertaining to Assignment of Error

A. Was the State's evidence insufficient to support the conviction beyond a reasonable doubt? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Ms. Turner-Murphy was charged by amended information with one count of vehicular homicide, committed as follows:

That the defendant, ELIZABETH L. TURNER-MURPHY, in the State of Washington, on or about October 26, 2017, did drive or operate a motor vehicle and have within two hours of driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood and/or did operate the vehicle while under the influence of or affected by intoxicating liquor or any drug, and/or did drive or operate a motor vehicle in a reckless manner, and did thereby proximately cause injury to VALARIE M. DALY, a person who died within three years on or about October 26, 2017 as a proximate result of said injury. (CP 193).

The case proceeded to jury trial.

On October 25, 2017, the night before the accident, Ms. Turner-Murphy spent a typical Wednesday after work with her children at home. (3/26/19 RP 668). Her partner had obtained a

more permanent job in Idaho as a journeyman electrician so they had drinks to celebrate. (*Id.*) She had two seltzer water, ice, and vodkas in fairly good-sized cups. (*Id.* at 668-69). Ms. Turner-Murphy was not feeling well and was tired so she went to bed at 10 p.m. (*Id.* at 669). Her alarm went off at 4 a.m. for work, but she was still not feeling well and called to say she was not coming in to work. She went back to sleep and did not wake up until 8 a.m. (*Id.*) Although feeling not too great, Ms. Turner-Murphy had an errand to run so she got in her Expedition and left. (*Id.* at 670).

She got on Grace Avenue, east of Pines Road in Spokane Valley. (3/26/19 RP 670). There was a lineup of about 3-4 cars at the stop sign on Grace and it took her 5-7 minutes to get there. (*Id.*) She looked left and right and repeated the process again. It looked like a clear enough path to get across Pines so she went. (*Id.* at 670-71). Next thing she knew, there was a crash. (*Id.* at 671). Ms. Turner-Murphy realized something bad had happened and finished crossing Pines before stopping. (*Id.*) Shaking, she got out and looked for her phone, but could not find it. After seeing someone else with a phone who could call for help and another helping the person on the ground, she got back in the SUV and

waited. (*Id.*). She was approached by Trooper Barry Marcus and the next person to come over was a paramedic. (*Id.* at 672).

Ms. Turner-Murphy never saw the motorcycle that hit the right side of her SUV. (*Id.* at 673).

Dianna Daly was the mother of Valarie Daly, the motorcycle driver who died after running into the side of Ms. Turner-Murphy's SUV around 8:56 a.m. on October 26, 2017. (3/20/19 RP 239-40). She said her daughter worked at Sedgwick, 1121 N. Argonne, where she would normally take Trent to Argonne and then to work. It was less than three miles from Valarie Daly's home. (*Id.* at 240). But she went on Pines this day. (*Id.*at 243).

Maura Gopar had dropped her child off at Trent Elementary around 8:40 a.m. on October 26, 2017. (3/26/19 RP 248). Going on Pines Road to I-90, she was in the inside lane closest to the sidewalk. (*Id.* at 249-50). The speed limit was 35 mph and she was almost at that speed after the school zone with a 25 mph limit. (*Id.* at 251). Ms. Gopar saw a motorcycle, going about 20-25 mph, at E. Trent and Pines. (*Id.* at 252-53). The motorcycle was in the inside lane. (*Id.* at 253). The motorcycle passed her on Pines. (*Id.* at 261). She saw Ms. Turner-Murphy suddenly come out from Grace. Ms. Gopar saw the SUV about 1-2 seconds before the

impact where the motorcycle hit the side of the vehicle. (*Id.* at 253-55). The rider, Ms. Daly, fell to the ground. Ms. Turner-Murphy got out, looked around at the damage, and got back into her SUV. (*Id.* at 255-56). The Expedition was stopped about 100 feet from where the accident happened. (*Id.* at 256). The motorcycle was on the sidewalk at Grace and Pines. (*Id.* at 257). Ms. Gopar got out of her car and checked on Ms. Daly, who was unconscious. (*Id.*). People were trying to help her. (*Id.* at 258).

Michael Deafled, a shuttle driver for the Black Pearl Casino on Pines, ferried employees to and from a parking lot on Grace and Pines. (3/20/19 RP 275-77). He was driving with Lynette Williams, a Black Pearl employee, on October 26, 2017. (*Id.* at 278-79). It was sunny and the road dry. (*Id.* at 279). He was coming out of the lot onto Grace when Ms. Turner-Murphy's SUV went around him. (*Id.*). Mr. Deafled saw a car coming down Pines and, once the car passed, the SUV did a California roll through the stop sign after the driver looked to the left. He said the driver did not look right. (*Id.* at 279-80). The SUV zoomed out and tried to cross four lanes of traffic on Pines. (*Id.* at 281). The motorcycle was in the inside lane of Pines. (*Id.* at 282). After impact, the SUV's driver got out, got on her phone, and looked at the damage to her vehicle.

(*Id.*). He said the cycle had no time to react. (*Id.* at 263). He did not see the SUV driver slam on the brakes. (*Id.*).

Ms. Williams, the shuttle passenger, said they were behind Ms. Turner-Murphy on Grace when she did a California roll and went across Pines. (3/20/19 RP 287-91). Traffic was average and not overly heavy. (*Id.* at 291). She said the motorcycle was in the lane on Pines closest to the sidewalk going south toward the Black Pearl. (*Id.* at 292). Ms. Williams said the point of impact was where the motorcycle was. (*Id.*). She saw the crash. (*Id.* at 293). The SUV came to an immediate stop. (*Id.*). The victim was moved to do CPR. (*Id.* at 294). Ms. Williams was on the phone with 911 as she went right to the victim and the motorcycle. (*Id.*). She relayed instructions received over her phone to the persons helping Ms. Daly. (*Id.* at 295). A man was giving her CPR. (*Id.* at 296). Ms. Williams was very upset. (*Id.* at 297).

Dr. John Howard, Spokane County medical examiner, performed an autopsy on Ms. Daly on October 26, 2017. (3/20/19 RP 303-05). She suffered multiple blunt force injuries, multiple internal injuries, and a tear of the brainstem, which is uniformly fatal. (*Id.* at 307-08, 316). Dr. Howard opined the accident caused Ms. Daly's death. (*Id.* at 317).

On October 26, 2017, Mary Hayward was taking her kids to school. (3/20/19 RP 331). She was headed west on Grace and was going to go north on Pines, but went straight after seeing the accident. (*Id.* at 333). She had been behind the SUV pulling out from Grace across Pines. (*Id.*). The SUV's driver had come to a full stop on Grace, then hit the gas, and struck the motorcycle. (*Id.* at 334, 341). The SUV was almost all the way across Pines when the cycle came up and hit the vehicle. (*Id.* at 335). Ms. Hayward did not see the motorcycle going up Pines. (*Id.* at 341). She said the motorcycle had no time to brake or swerve. (*Id.*). At impact, Ms. Daly flew up and hit the ground hard. (*Id.* at 336). Ms. Hayward went right behind the SUV, pulled off to the side, and got out. (*Id.*). She was upset and emotional. (*Id.* at 337). She contacted the SUV driver, Ms. Turner-Murphy, and told her to stay and not go anywhere. (*Id.* at 339). She called 911 as Ms. Daly did not look good and appeared to be deceased. (*Id.*).

Robert Barber was on Pines going toward I-90 on October 26, 2017. (3/20/19 RP 354). He was a passenger in the vehicle driven by his girlfriend in the lane closest to the sidewalk. (*Id.* at 355). A motorcycle was in the same lane going at an appropriate speed. (*Id.*). As they got closer to the intersection of Pines and

Grace, he saw a green SUV do a California stop and keep going. (*Id.* at 356). Mr. Barber saw the cycle hit the side of the SUV, with no chance to hit the brakes. (*Id.*). There were two cars between the motorcycle and his vehicle. (*Id.* at 357). He did not see any brake lights come on from the motorcycle. (*Id.* at 359). Ms. Daly flew off and was unresponsive. (*Id.*). Mr. Barber saw the SUV driver look both ways before proceeding across Pines. (*Id.*).

Trooper Marcus was on duty on October 26, 2017, and responded to the accident. (3/21/19 RP 382-83). The collision call came in at 8:56 a.m. and CPR was in progress on Ms. Daly when he arrived. (*Id.* at 384). Ms. Turner-Murphy's SUV was facing west on Grace and the motorcycle was closer to Pines but still on Grace. (*Id.* at 384-85). The SUV was a Ford Expedition with damage on the right side passenger door area. (*Id.* at 385). Trooper Marcus thought Ms. Hayward was the driver as she was extremely distraught. (*Id.* at 388-89). She was not the driver so he went to talk to Ms. Turner-Murphy. (*Id.* at 389-90). She was sitting in the driver's seat of the SUV with a resigned or unemotional look on her face. (*Id.* at 390).

Ms. Turner-Murphy told him she was going east to west on Grace to cross Pines and then continuing west on Grace. (3/21/19

RP 391). She did not see the motorcycle. (*Id.*). Traffic on Pines had the right of way. (*Id.* at 392). The motorcycle hit the side of the Expedition. (*Id.*). Ms. Turner-Murphy told the trooper she had no alcohol that morning. (*Id.* at 405). She agreed to do field sobriety tests and did. (*Id.* at 406-20). Trooper Marcus testified Ms. Turner-Murphy had nystagmus in both eyes. (*Id.* at 419-20). The trooper determined she had consumed alcohol and could smell alcohol on her breath. (*Id.* at 420). In the walk-and-turn test, he said she had indicators that could be showing impairment. (*Id.* at 420-25). In the one-leg stand test, her performance was not good, indicating impairment from alcohol. (*Id.* at 428).

From the totality of the circumstances, Trooper Marcus determined Ms. Turner-Murphy could not safely operate a motor vehicle. (3/21/19 RP 428). He placed her under arrest for DUI/vehicular assault. (*Id.* at 429). Ms. Turner-Murphy sat in his patrol car and was taken to Valley Hospital. (*Id.* at 430). The trooper got a warrant for a blood draw, which was done. (*Id.* at 430-33). He followed standard operating procedure thereafter for the blood vials. (*Id.* at 433-36).

Ms. Turner-Murphy said she stopped at Pines, looked both ways, and did not see anyone coming. (3/21/19 RP 436). Trooper

Marcus was notified Ms. Daly had died. (*Id.*). He told Ms. Turner-Murphy. (*Id.*). He felt she was obviously affected by alcohol. (*Id.* at 437). Her ability to operate a motor vehicle was impaired and she should not have been driving. (*Id.*). Ms. Turner-Murphy said she had been drinking the night before, but stopped at 10 p.m. (*Id.* at 438). Trooper Marcus did acknowledge she could have been in shock. (*Id.* at 445). He said the field sobriety tests were just clues or indicators. (*Id.* at 446-47).

Trooper James Wickham was on duty the morning of October 26, 2017, and responded to the accident. (3/21/19 RP 477). He was a collision technical specialist and arrived around 9:15 a.m. (*Id.* at 477-78). The accident occurred in lane 1, closest to the sidewalk. (*Id.* at 479). His report, however, said the victim was in lane 2, the inside lane. (*Id.* at 497). The motorcycle hit the SUV door and pushed Ms. Daly over the handlebars, hitting the passenger side door and breaking the window with her helmet and head. (*Id.* at 484). Trooper Wickham determined Ms. Turner-Murphy failed to yield the right-of-way to traffic on Pines. (*Id.* at 493). He said the average reaction time was 1.5 seconds. (*Id.* at 499). If you do not see something, there is no reaction time. (*Id.* at

508). The trooper indicated there was no car in front of the motorcycle so Ms. Daly had a clear view. (*Id.* at 509).

David Nguyen, a forensic scientist with the state toxicologist, had a blood alcohol permit, enabling him to test for alcohol in DUI cases. (3/25/19 RP 543-46). He performed an analysis of the blood vials from Ms. Turner-Murphy and his toxicology test report concluded she had .15 blood alcohol. (*Id.* at 562). He said at .08, it is not safe to operate a motor vehicle. (*Id.* at 565).

Detective Ryan Spangler of the Washington State Patrol was certified in collision reconstruction. (3/25/19 RP 602). He was called to the accident on Grace and Pines on October 26, 2017, about 9:40 a.m. (*Id.* at 606). On inspecting the scene, he concluded no one tried to stop. (*Id.* at 626). There was also no indication of mechanical failure of the SUV or the motorcycle. (*Id.* at 635-36). He was unable to give an estimate of the speed of the vehicles. (*Id.* at 637). But Detective Spangler testified Ms. Daly had enough time to react and stop. (*Id.* at 645).

There were no exceptions to the jury instructions given by the court. (3/25/19 RP 662-63). The jury found Ms. Turner-Murphy guilty of vehicular homicide under the DUI prong. (3/26/19 RP 784-85; CP 263). The court imposed on Ms. Turner-Murphy a standard

range sentence of 96 months with a 24-month enhancement for a prior conviction of first degree negligent driving reduced from DUI, resulting in total confinement of 120 months. (CP 304-16). This appeal follows. (CP 325).

III. ARGUMENT

A. The State's evidence was insufficient to support the conviction beyond a reasonable doubt.

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). In a challenge to sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d

1037 (1972).

The question is whether the State proved beyond a reasonable doubt that Ms. Turner-Murphy's driving proximately caused the death of Valarie Daly. (CP 236). It is beyond dispute that the accident killed Ms. Daly. (3/20/19 RP 317). Ms. Turner-Murphy asserted the defense of a superseding intervening cause. Accordingly, the court gave instruction 11, based in part on *State v. Imokawa*, 4 Wn. App.2d 545, 422 P.3d 502 (2018):

If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death, it is not a defense that the driving of another may also have been a proximate cause of the death.

However, if a proximate cause of the death was a new, independent intervening act of another which the defendant, in the exercise of ordinary care, should not reasonably anticipate as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's act has been committed or begun.

However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the

defendant should have reasonably anticipated.

The State has the burden of proving beyond a reasonable doubt both (1) that the defendant's conduct was a proximate cause of the death, and (2) that the conduct of another did not constitute a superseding cause of death that occurred in this case. (CP 242).

Prong 2 of the final paragraph on the State's burden of proof in the jury instruction was based on *Imokawa*, which required that language. The Court of Appeals' decision was reversed in *State v. Imokawa*, 194 Wn.2d 391, 450 P.3d 159 (2019). The reversal is of no moment here because the jury found Ms. Turner-Murphy guilty in any event.

The defense was articulated by counsel in closing argument:

. . . [Ms. Daly] was supposed to start work at 9:00. She worked on Argonne. She still had a ways to go. Ms. Daly started off next to Gopar, Ms. Gopar, tucked behind her. She increased her speed after getting out of the school zone. She increased her speed to 35 miles an hour, and Ms. Gopar's statement that she prepared, said she passed her; that she passed her. With nobody in front of her, this would have been what she saw. All four lanes of traffic.

Trooper Wickham testified he walked the scene and there were no obstructions. Detective Spangler testified that accounting for reaction time there was still 2.5 seconds left. That included reaction time. Everyone else sees the SUV and brakes.

Dr. Howard said that he did not find anything in his

medical examination that would lead him to believe there was any eyesight issues with Ms. Daly. He did say bones begin to break at 35 miles per hour. He testified that Ms. Daly had several broken bones, fractures, as they're also known, consistent with an accelerated speed, a speed that would have gotten her to the intersection quicker than anticipated. If Ms. Daly had not been speeding, would Ms. Turner-Murphy have been able to get all the way across? But still the question is why, again, why no brake marks?

Trooper Wickham said there was no mechanical failure with the motorcycle. And this accident happened at 8:56 a.m. Ms. Daly's actions were a superseding intervening act that broke the chain of events that began when Ms. Turner-Murphy left the stop sign. Ms. Daly's actions of speeding up after the school zone and passing the Jeep in the 35 miles per hour zone happened after Ms. Turner-Murphy took off. She had no control over Ms. Daly's actions.

Trooper Wickham said you have a duty to yield to the legally traveling traffic. If someone is speeding, are they legally traveling in traffic? (Weeks 3/26/19 RP 42-43).

Resolution of the case depended on whom the jury believed.

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). But the existence of facts cannot be founded on guess, speculation, or conjecture and that is what happened. The testimony of the witnesses differed regarding the lane in which Ms. Daly was traveling and whether Ms. Turner-Murphy came to a complete stop and looked both ways before crossing Pines. What is undisputed,

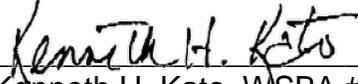
however, is Ms. Daly had a clear and unobstructed view of Pines and the vehicles immediately behind her all stopped. Ms. Daly did not. Indeed, the State's own witness, Detective Spangler, testified Ms. Daly had enough time to react and stop. When she started going across Pines, Ms. Turner-Murphy could not have reasonably anticipated Ms. Daly's failure to react and stop her motorcycle to avoid the collision. Foreseeability is not a consideration. (Instruction 11, CP 242). Ms. Daly simply did not react to an avoidable situation and her inaction superseded Ms. Turner-Murphy's original act.

The State's evidence is taken as true in challenges to the sufficiency of the evidence. *Drum, supra*. The State itself showed Ms. Daly had time to react and stop. She did not. The evidence fell short of proving beyond a reasonable doubt that Ms. Turner-Murphy was the proximate cause of the death of Ms. Daly, whose failure to act was a superseding intervening cause. *Green, supra*. The jury had to guess and speculate whether Ms. Turner-Murphy was the proximate cause of the accident. That is insufficient evidence and the verdict cannot stand. *Hutton, supra*. The conviction must be reversed and the charge dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Turner-Murphy respectfully urges this Court to reverse her conviction and dismiss the charge.

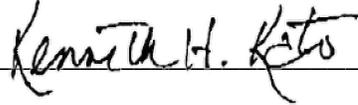
DATED this 10th day of April, 2020.



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CERTIFICATE OF SERVICE

I certify that on April 10, 2020, I served a copy of the brief of appellant by USPS on Elizabeth L. Turner-Murphy, # 415779, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300; and by the eFiling portal on Larry Steinmetz at his email address.



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