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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ELIZABETH TURNER-MURPHY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

Was there sufficient evidence for the jury to convict the defendant of vehicular homicide.

II. STATEMENT OF THE CASE

A jury convicted Elizabeth Turner-Murphy of vehicular homicide and found by special interrogatory that Turner-Murphy operated a motor vehicle while under the influence of intoxicating liquor at the time of the collision and injury to the victim. CP 283-84.

Substantive facts.

On October 26, 2017, at approximately 8:40 a.m., Maura Gopar was traveling southbound in her vehicle on Pines Road (State Route 27) in the Spokane Valley.¹ RP 248-49, 292, 477-78.² That section of roadway had four lanes (two lanes each direction) of travel for north-south bound traffic. RP 250, 508. As Gopar approached the intersection of East Trent Avenue and Pines, she observed a motorcycle travelling between 20 and 25 miles per hour. RP 252-53. The driver of the motorcycle, Valerie Daly, was moving in the same direction and was parallel to Gopar's vehicle in the

¹ It was clear and sunny, the roadway was dry, and it was approximately 40 degrees at the time. RP 481.

² The transcript of proceedings by Court Reporter Crystal Hicks consisting of two, consecutively numbered volumes will be referred to simply as "RP." All others will be referred to by the last name of the reporter ("Weeks RP").

adjoining lane. RP 253, 290. The motorcycle then moved a short distance ahead of Gopar, as both vehicles approached the Grace Avenue and Pines intersection. RP 253-55, 261-62. Daly was wearing a helmet. RP 243, 257-58, 296. The posted speed limit for Pines Road in that area was 35 miles per hour. RP 482, 638-39. For that section of roadway, Pines was straight and in good repair. RP 482-83. There were no sight obstructions for motorists stopped on Grace Avenue when looking in either direction on Pines for oncoming traffic. RP 482-83.

Contemporaneously, witness Michael Deafled, who was westbound on Grace, observed Turner-Murphy as she drove in the same direction and approached the Grace/Pines intersection; as Turner-Murphy slowed her SUV and “rolled” past the posted stop sign at that intersection, she then “zoomed” into the intersection. RP 279-80, 290-91. Turner-Murphy looked to the left at the intersection; however, she did not look to the right toward the direction of travel of Daly. RP 280-81. Robert Barber also described Turner-Murphy’s driving as a “California stop” as it entered the intersection. RP 356.

Mary Hayward saw Turner-Murphy’s SUV at the intersection “just hit the gas out of nowhere and strike the motorcyclist.”³ RP 333. Lynette

³ Witness Barber observed Daly’s motorcycle travelling on Pines before the collision and remarked that the speed of the motorcycle was appropriate. RP 355.

Williams described Turner-Murphy's driving the SUV as it approached the intersection and then into the intersection as, "Go slow, creep creep, go. And, yeah, just kind of a jet" into the intersection. RP 297.

Gopar observed Turner-Murphy's Ford Expedition "suddenly come out of Grace" Avenue, colliding with Daly's motorcycle. RP 253-55, 261-62. Gopar observed Turner-Murphy's vehicle one to two seconds before it impacted the motorcycle. RP 255. When Daly's motorcycle impacted the passenger side of Turner-Murphy's vehicle, Daly's body went upward and then forcefully struck the ground. RP 336, 356, 385. Witnesses who observed the collision believed Daly had no time to react before the impact with Turner-Murphy's vehicle. RP 283, 335, 356.

After travelling approximately 40 to 50 feet after the collision and stopping on westbound Grace, Turner-Murphy exited her SUV, surveyed the damage to her own vehicle, and then got back inside her vehicle. RP 255-56, 616. Meanwhile, several passersby gave first aid to Daly. RP 258, 294-96, 348-49, 357-58. Daly was unconscious at the scene and no pulse was detected. RP 348-49, 357.

Washington State Patrol Trooper Barry Marcus arrived on scene and observed Turner-Murphy's 1997 Ford Expedition facing westbound on Grace Avenue. RP 384-85, 635. The physical damage to Turner-Murphy's Ford Explorer was consistent with witness' accounts of the collision.

RP 392. During his investigation at the scene, Marcus spoke with the defendant. RP 300-91. Turner-Murphy told the trooper that she was driving east to west on Grace, and once through the intersection at Pines, she was going to continue westbound on Grace.⁴ RP 391. At the scene, Grace Avenue had stop signs posted at the intersection for both east and westbound traffic, which required traffic on Grace to stop for traffic on Pines; there was no traffic control for Pines north-southbound traffic and those drivers had the right-of-way at the intersection. RP 392, 428, 493; Exs. P-5 (RP 398-99, 481-82), P-6 (RP 399-400), P-7 (RP 400); P-12 (RP 402); P-13 (RP 402), P-15 (RP 402-03, 493-94). Turner-Murphy denied drinking any alcohol that morning and had a flat affect during the trooper's entire contact with her.⁵ RP 390, 405-06, 436.

Marcus was a certified Drug Recognition Expert and he was also trained on how to conduct standardized field sobriety tests. RP 369, 381. Turner-Murphy had an odor of alcohol on her breath and agreed to perform

⁴ The trial court had conducted a CrR 3.5 hearing and determined Turner-Murphy's statements to the trooper were admissible at the time of trial. CP 301-03; RP 149-221.

⁵ In that regard, Turner-Murphy never inquired regarding Daly's condition during the trooper's contact with her. RP 429, 436.

the sobriety tests.⁶ RP 406, 420. When the trooper conducted the horizontal gaze nystagmus test, Turner-Murphy presented six out of six clues, indicating intoxication. RP 419-20. Turner-Murphy next performed the walk and turn test (a divided attention test), exhibiting four out of eight clues suggesting impairment. RP 421-25. On the one leg stand, Turner-Murphy presented three out of four factors indicating intoxication. RP 425-27. Thereafter, a search warrant was authorized for Turner-Murphy's blood and she was transported to the Valley Hospital for that purpose. RP 430-32. Turner-Murphy's blood was drawn at approximately 10:30 a.m.⁷ RP 433, 525-26. At the hospital, Turner-Murphy was adamant that she stopped at the intersection, looked both ways, and did not see any traffic approaching on Pines. RP 436. Turner-Murphy asserted that she consumed six shots of vodka at her home the previous evening and finished drinking around 10:00 p.m. RP 438.

⁶ Other than visible, superficial cuts to her hands and face from the shattered glass of her vehicle, Turner-Murphy asserted she had no apparent injuries and she also had been assessed by the fire department. RP 407, 443-44.

⁷ The blood was collected and placed into two separate, gray topped vials, which had been provided by the Washington State Patrol Toxicology laboratory. RP 430-31, 433, 534-35. Each vial had previously been sealed, posted with a lot number, and had an expiration date. RP 431, 535. Additionally, both vials contained the required anticoagulant and enzyme poison. RP 431, 523, 558. The vials were subsequently forwarded to the WSP Toxicology Laboratory on October 30, 2017. RP 538. The lab received the blood vials on October 31, 2017. RP 547, 549, 552.

Washington State Patrol forensic scientist David Nguyen tested Turner-Murphy's blood and determined her blood contained 0.15 grams of alcohol per one-hundred milliliters of blood. RP 542, 561-62. Nguyen followed all required protocol and peer review for his testing and analysis. RP 553-61. Nguyen opined that scientific studies have shown that it is not safe to operate a motor vehicle with an .08 percent or greater blood alcohol level. RP 565.

Trooper James Wickham, a WSP certified collision technical specialist, responded to the scene shortly after the collision. RP 475, 477. When Wickham arrived on scene, he observed Daly's 2017 Triumph motorcycle flat on the ground in the lane closest to the sidewalk, in the southbound lane of Pines Road; Daly was southwest of the motorcycle receiving treatment from fire department personnel. RP 478-79, 635. Shortly after Daly was taken from the scene, she died. RP 479.

Wickham determined that when Daly's motorcycle hit the passenger side door of the Ford Expedition, it pushed Daly forward over the handlebars; Daly struck the passenger side door and window with her helmet and head. RP 484. At the point of impact with the Ford Expedition, Daly's motorcycle was traveling at 35 miles per hour based upon witness statements. RP 497. The motorcycle was a complete loss. RP 490; Ex. P-14 (RP 491). Wickham looked for and did not find any tire marks or other

indicia that Turner-Murphy attempted to brake or take any corrective action before the collision. RP 485-86, 489. Moreover, there was nothing at the crime scene that suggested either vehicle had a mechanical failure. RP 492. Wickham determined that the Turner-Murphy failed to yield the right-of-way to southbound traffic on Pines. RP 493.

Washington State Patrol Detective Ryan Spangler, a certified collision reconstructionist, also responded to the scene. RP 603, 606. Spangler observed Daly's motorcycle had a substantial amount of front-end, contact damage. RP 608; Exs. P-13, P-14 (RP 612). The force and impact of the collision caused Daly's tennis shoes to separate from her body; one shoe landed approximately 15 to 20 feet from Daly and the other shoe travelled approximately 85 feet. RP 614-15, 633. Spangler characterized the impact of the motorcycle with the Ford Expedition as hitting a "brick wall" due to the weight differences of the two vehicles.⁸ RP 617; Ex. P-16 (RP 616). Neither vehicle attempted to brake before, during, or after the collision based upon no corresponding tire marks on the pavement's surface. RP 625-26. There was no evidence Daly noticed Turner-Murphy's vehicle before the collision. RP 645.

⁸ Daly's motorcycle weighed approximately 437 pounds and the Turner-Murphy's Ford Expedition weighed about 4860 pounds. RP 635-36.

Spokane County Medical Examiner John Howard performed an autopsy on Daly on October 26, 2017. RP 303, 305. Daly presented “dozens of [blunt impact] injuries involving her face, chest, abdomen, and all four extremities” and multiple internal injuries. RP 307-08. Daly had “rib fractures on both sides, fractures of her sternum or the breastbone, bruising in all lobes of both lungs, blood in both chest cavities, lacerations or tears of her liver and spleen, blood in her abdominal cavity, and fractures of her pelvic bones.” RP 307-08. Ultimately, Daly’s brain stem had dislodged from her cervical spine. RP 308, 316. Howard attributed the cause of death to blunt head, neck, chest, abdominal and pelvic injuries from a traffic collision. RP 317. Daly’s injuries were consistent with an impact from Turner-Murphy’s vehicle. RP 314.

On cross-examination, Turner-Murphy asserted that she looked and did not see any vehicles approaching from either direction on Pines before she entered intersection. RP 674-75. Turner-Murphy admitted she knew that alcohol impairs an individual’s judgment, impairs vision and slows down coordination. RP 676-77. However, Turner-Murphy maintained she was not under the influence at the time of the collision. RP 678. Turner-Murphy also denied exiting her vehicle after the collision to assess the damage to her vehicle; she alleged she first saw the damage to her vehicle as reported in a newspaper days later. RP 680.

III. ARGUMENT

SUFFICIENT EVIDENCE EXISTED FROM WHICH A JURY COULD FIND TURNER-MURPHY GUILTY OF VEHICULAR HOMICIDE.

Although unclear, it appears that Turner-Murphy argues that Daly – who drove on a portion of roadway on Pines at the speed limit with no traffic controls – had a duty to yield the right way to Turner-Murphy at the intersection, notwithstanding that Turner-Murphy was intoxicated, did not stop at the Grace/Pines intersection as required and failed to yield the right-of-way to Daly and other oncoming traffic on Pines. Curiously, Turner-Murphy then asserts that Daly’s failure to observe Turner-Murphy at the intersection and “yield the right-of-way” to her was an intervening/superseding cause of the collision. Despite Turner-Murphy’s drunkenness and failure to obey the traffic laws, she alleges she was not the proximate cause of the collision. This claim is without legal or factual merit as discussed below.

Standard of review.

An appellate court reviews a challenge to the sufficiency of the evidence de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014). Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational jury could find that all

of the elements of the crime charged were proven beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017).

In a sufficiency of the evidence claim, a defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Likewise, a jury's finding by special interrogatory is reviewed under the same sufficiency of the evidence standard. *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). Both circumstantial and direct evidence are equally reliable. *Cardenas-Flores*, 189 Wn.2d at 266. Review for sufficiency of the evidence is highly deferential to the jury's decision, including issues of credibility, persuasiveness, and conflicting testimony. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

As charged in the present case, vehicular homicide is defined as:

- (1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:
 - (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or
 - (b) In a reckless manner.

RCW 46.61.520(1)(a), (b); CP 238; Weeks RP 16.

Driving while under the influence of intoxicating liquor was defined under the court's instruction number 9 as:

A person is under the influence or affected by the use of intoxicating liquor or any drug when he or she has sufficient alcohol in his or her body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable analysis of the person's blood or the person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of intoxicating liquor or the combined influence or affected by intoxicating liquor and any drug.

The fact that a person is or has been entitled to use such drug under the laws of this state does not constitute a defense.

CP 256.

The court defined proximate cause under instruction number 10 as:

To constitute vehicular homicide, there must be a causal connection between the death of a human being and the driving of a defendant so that the act done was a proximate cause of the resulting death.

The term "proximate cause" means a cause which, in a direct sequence produces the death, and without which the death would not have happened.

There may be more than one proximate cause of a death.

CP 257.

The court further instructed the jury under instruction number 11, in pertinent part, that the "State had 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 258. This instruction was

based upon the holding in *State v. Imokawa*, 4 Wn. App. 545, 422 P.3d 502 (2018), which was later reversed by the Supreme Court. *See State v. Imokawa*, 194 Wn.2d 391, 450 P.3d 159 (2019).

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. McAllister*, 60 Wn. App. 654, 660, 806 P.2d 772 (1991), *abrogated on other grounds*, *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005). A defendant is not responsible for a death resulting from his or her driving if the death was caused by a superseding intervening event. *See State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57 (1995). “An intervening cause is a force that operates to produce harm *after* the defendant has committed the act or omission.” *State v. Frahm*, 193 Wn.2d 590, 600, 444 P.3d 595 (2019) (emphasis added); *see State v. Roggenkamp*, 115 Wn. App. 927, 945, 64 P.3d 92 (2003), *aff’d*, 153 Wn.2d 614 (2005). “Intervening is used in a time sense; it refers to later events.” *State v. Souther*, 100 Wn. App. 701, 710, 998 P.2d 350 (2000). Only an intervening act not reasonably foreseeable is a superseding cause sufficient to relieve a defendant from culpability. *Frahm*, 193 Wn.2d at 600.

For example, in *Souther*, the defendant was charged with vehicular homicide for the death of a motorcyclist with whom he collided while

driving under the influence of alcohol. 100 Wn. App. at 704. Both vehicles were opposite each other at an intersection and had a green light. Souther attempted to make a left turn and collided with the motorcycle as it drove through the intersection. The *Souther* court held that even if the victim/motorcyclist was exceeding the speed limit and had his turn signal on at the time of the collision, these actions existed before the defendant's act and could not be considered intervening causes. *Id.* at 710.

Likewise, in *Roggenkamp*, the defendant was driving on a residential county road that had driveways and mailboxes with a posted speed limit of 35 miles per hour. 115 Wn. App. at 931. Roggenkamp entered the oncoming traffic lane to pass another vehicle and reached a speed of about 70 miles per hour. *Id.* at 933. Roggenkamp testified that he was passing the other vehicle, still in the oncoming traffic lane, when he saw Chilcoate's vehicle turn from an intersection into the same lane in which he was traveling. *Id.* at 933. Roggenkamp immediately braked, sending his vehicle into a skid. *Id.* Yet another vehicle, driven by Carpenter, pulled out of the same intersection behind Chilcoate. *Id.* Roggenkamp was unable to stop before he collided with Carpenter's vehicle. *Id.* The collision seriously injured three individuals in Carpenter's vehicle and killed another. *Id.* Carpenter had a blood alcohol content level of 0.13. *Id.* at 934.

Division One held that Carpenter's actions were not a superseding cause of the accident because Roggenkamp could foresee that vehicles would turn onto a rural residential road such as the one driven on by Roggenkamp. *Id.* at 946. Even though Roggenkamp was locked in a brake-skid at the time of the collision, the *Roggenkamp* court reasoned that his recklessness was ongoing at the time of Carpenter's act of pulling into the intersection, making Carpenter's action at most a concurrent cause. *Id.* at 947. In affirming Division One, our Supreme Court was "entirely in agreement" with the lower court's decision and reasoning. *Roggenkamp*, 153 Wn.2d at 630-31.

The only causal connection the State needs to prove in a vehicular homicide case "is the connection between the act of driving and the accident." *Rivas*, 126 Wn.2d at 451; *State v. Lopez*, 93 Wn. App. 619, 624, 970 P.2d 765 (1999). A driver's conduct is not the proximate cause if some other action was the *sole* cause of the harm. *State v. Meekins*, 125 Wn. App. 390, 397, 105 P.3d 420 (2005). However, when the victim's conduct is at most a concurring cause of the injuries, evidence of that conduct is irrelevant in prosecutions for both vehicular assault and vehicular homicide. *Roggenkamp*, 153 Wn.2d at 631; *see also State v. Neher*, 52 Wn. App. 298, 301, 759 P.2d 475 (1988), *aff'd*, 112 Wn.2d 347 (1989)

(whether another is a contributing cause does not affect a defendant's culpability).

For example, in *State v. Hursh*, the defendant was charged with vehicular assault for colliding with the victim's car while driving under the influence. 77 Wn. App. 242, 243, 890 P.2d 1066 (1995), *abrogated on other grounds, Roggenkamp*, 153 Wn.2d at 622. The victim was not wearing a seatbelt and suffered extensive injuries. *Id.* The trial court excluded evidence of the victim's failure to wear a seatbelt as irrelevant, which was affirmed on appeal. *Id.* at 244-45. The reviewing court concluded that "[e]ven though [the victim's] failure to wear a seatbelt may have contributed to the seriousness of his injuries, that act did not cause the accident and was not the sole cause of [his] injuries." *Id.* at 245. The victim's failure to use a seatbelt could not relieve the defendant of criminal liability. *Id.*

Similarly, in *Meekins*, the court held that evidence that the motorcyclist victim was not wearing a helmet was irrelevant in a vehicular homicide case because the lack of the helmet could not have been a proximate cause without the defendant's driving also being a proximate cause. 125 Wn. App. at 401. The evidence had no tendency to prove that the lack of helmet was the sole or superseding proximate cause. *Id.*

Sufficiency of the evidence in the present case.

Turner-Murphy was intoxicated, she slow rolled through a posted stop sign for her lane of travel, failed to look for oncoming traffic in Daly's direction, and accelerated into the intersection which caused the collision with Daly. Turner-Murphy had a duty to stop at the intersection and yield the right-of-way to oncoming traffic on Pines, which she failed to do.⁹ See RCW 46.61.190(2). There was *no* evidence presented at trial that Daly was speeding when she collided with Turner-Murphy's vehicle. Indeed, Trooper Wickham determined Daly's motorcycle was traveling the speed limit at 35 miles per hour at the time of the collision based upon all witness statements. RP 497. By all witness accounts, Turner-Murphy's rapid acceleration into the intersection gave Daly little, if any, time to react.

For the sake of argument, even if Daly was speeding or had the opportunity to and did not react to Turner-Murphy's rapid entry into the intersection, Daly's conduct would, at most, be a concurrent cause of the collision; evidence of that type of conduct is irrelevant in a vehicular homicide prosecution. If anything, Turner-Murphy only alleges circumstances that existed prior to the collision and not a later event.

⁹ Other than Turner-Murphy, all other witnesses testified that she did not stop at the stop sign, but rather rolled through it.

Consequently, Turner-Murphy's allegations at trial and now on appeal do not present any evidence of a superseding cause and her argument fails.

Turner-Murphy's assertion that she "could not have reasonably anticipated ... Daly's failure to react and stop her motorcycle to avoid the collision" is not only unsupported by the record, but it completely disregards many years of well-settled jurisprudence. To place Turner-Murphy's argument in perspective and illustrate the faulty nature of it, her argument is comparable to a defendant in a murder prosecution claiming that the victim of a shooting did not anticipate and avoid a bullet fired from the defendant's gun. In failing to react and appreciate the consequences, it was the murder victim's fault for being struck by the bullet even though the defendant fired it. Clearly, such reasoning is not supported by the case authority and is illogical.

What is more, Turner-Murphy's assertion that she could not have anticipated Daly's motorcycle is directly contradicted by her testimony at trial. She admitted she was familiar with the Grace/Pines intersection as she regularly crossed that intersection and it was generally busy. Moreover, Turner-Murphy normally had to wait several minutes to cross the intersection because it was a high traffic area at that time of morning on Pines. RP 674-75.

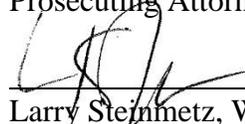
Based upon Turner-Murphy's testimony admitting the same, it can be reasonably inferred that she could have reasonably foreseen, and anticipated (and did so), not only Daly's vehicle, but other motorists travelling on and entering the Grace/Pines intersection from north and southbound Pines Road at the time of the collision. Thus, even accepting Turner-Murphy's allegations as true, not only did Daly's acts occur before the collision, but Turner-Murphy should have foreseen Daly entering the intersection; both factors negate a superseding cause as alleged by Turner-Murphy. Certainly, the jury weighed the evidence and determined that there was not an intervening event which superseded Turner-Murphy's criminal act as the actual cause of Daly's death. Sufficient evidence supports Turner-Murphy's vehicular homicide conviction and the aggravating circumstance that she was intoxicated at the time of the collision.

IV. CONCLUSION

From the reasons stated herein, the State requests the Court affirm the judgment and sentence.

Respectfully submitted this 26 day of May, 2020.

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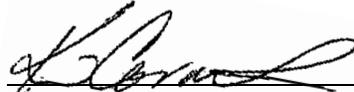
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I certify under penalty of perjury under the laws of the State of Washington, that on May 26, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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5/26/2020
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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