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NO. 51791-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF AUBURN,

Respondent,

v.

TERESA A. HEDLUND,

Petitioner.

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STATE OF WASHINGTON
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ON APPEAL FROM
THE AUBURN MUNICIPAL COURT
C78961 AUP and IC7374 AUP
Honorable Patrick Burns

AND

KING COUNTY SUPERIOR COURT
03-2-00810-9-KNT
Honorable James Cayce

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Pertaining to Assignments of Error	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	9
1. APPELLANT WAS A VICTIM OF TOM STEWART'S CRIME OF DUI	9
2. DUI IS NOT A VICTIMLESS CRIME	16
3. DOUBLE JEOPARDY PRECLUDED COMPLETION OF THE DUI ACCOMPLICE TRIAL FOLLOWING DISMISSAL OF THAT CHARGE	21
D. <u>CONCLUSION</u>	33

APPENDIX

- A. Copy of Relevant Auburn Municipal Court Docket
- B. Copy of Relevant portions of Report of Proceedings
- C. Copy of RCW 9A.08.020

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Castro v. Stanwood School Dist. No. 401,</u> 151 Wn.2d 221, 86 P.3d 1166 (2004)	10-11
<u>Dep't of Ecology v. Campbell & Gwinn, L.L.C.,</u> 146 Wn.2d 1, 43 P.3d 4 (2002)	11
<u>Harkins v. Justice Ct.,</u> 34 Wn. App. 508, 662 P.2d 403 (1983)	28
<u>Mackay v. Mackay,</u> 55 Wn.2d 344, 347 P.2d 1062 (1959)	27
<u>State v. Bastinelli,</u> 81 Wn.2d 947, 506 P.2d 854 (1973)	26
<u>State v. Bundy,</u> 21 Wn. App. 697, 587 P.2d 562 (1978)	25
<u>State v. Coe,</u> 86 Wn. App. 841, 939 P.2d 715 (1997)	18-19
<u>State v. Collins,</u> 112 Wn.2d 303, 771 P.2d 350 (1989)	25-27, 28, 32
<u>State v. Dowling,</u> 98 Wn.2d 542, 656 P.2d 497 (1983)	26
<u>State v. Ehli,</u> 115 Wn. App. 556, 62 P.3d 929 (2003)	17-18
<u>State v. Everett Dist. Ct.,</u> 24 Wn. App. 58, 600 P.2d 586 (1979)	28
<u>State v. Forbes,</u> 43 Wn. App. 793, 719 P.2d 941 (1986)	19
<u>State v. Glocken,</u> 127 Wn.2d 95, 896 P.2d 1267 (1995)	22
<u>State v. Hahn,</u> 83 Wn. App. 825, 924 P.2d 392 (1996)	11

<u>State v. Hornaday,</u> 105 Wn.2d 120, 713 P.2d 71 (1986)	14
<u>State v. Jacobs,</u> 154 Wn.2d 596, 115 P.3d 281 (2005)	11
<u>State v. Jones,</u> 26 Wn. App. 1, 612 P.2d 404 (1980)	25
<u>State v. Jubie,</u> 15 Wn. App. 881, 552 P.2d 196 (1976)	25
<u>State v. Keller,</u> 143 Wn.2d 267, 19 P.3d 1030 (2001)	13
<u>State v. Knapstad,</u> 107 Wn.2d 346, 729 P.2d 48 (1986)	30
<u>State v. Matuszewski,</u> 30 Wn. App. 714, 637 P.2d 994 (1981)	25
<u>State v. Roberts,</u> 117 Wn.2d 576, 817 P.2d 855 (1991)	13
<u>State v. Smith,</u> 15 Wn. App. 725, 551 P.2d 765 (1976)	25
<u>Wash. Pub. Ports Ass'n v. Dep't of Revenue,</u> 148 Wn.2d 637, 62 P.3d 462 (2003)	11-12

FEDERAL CASES

<u>Smith v. Massachusetts,</u> 543 U.S. 462, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005)	30-33
<u>United States v. Martin Linen Supply Co.,</u> 430 U.S. 564, 97 S.Ct. 1349 51 L.Ed.2d 642 (1977)	32

STATUTES

RCW 7.68.020(3)	12
RCW 9.94.030(47)	12
RCW 9A.08.020	1, 3, 10, 13, 16, 20, 23, 33
RCW 9A.08.020(5)	1, 4, 5, 6, 9, 10
RCW 9A.08.020(5)(b)	24
RCW 46.61.5152	14

WASHINGTON CONSTITUTION

Const., article I, section 9	21
------------------------------------	----

UNITED STATES CONSTITUTION

U.S. Const. amend. V	21-22
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OTHER AUTHORITIES

<u>Merriam-Webster Dictionary,</u> Home and Office Edition (1998)	13
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A. ASSIGNMENTS OF ERROR

(1) The superior court erroneously reversed the trial court's ruling that appellant was a victim under RCW 9A.08.020

(2) Following the initial review, the trial court erred in not dismissing the charges against appellant on double jeopardy grounds

Issues Pertaining to Assignments of Error

(1) Was the appellant a "victim" as that term is used in RCW 9A.08.020(5), thereby precluding her conviction as an accomplice?

(2) After the trial court granted appellant's motion to dismiss, did further proceedings on the dismissed charges violate the Constitutional prohibition against double jeopardy?

B. STATEMENT OF THE CASE

This case arises from a tragic automobile accident on July 16, 2001 in the City of Auburn. CP 771-72. The car, driven by Tom Stewart, struck a large concrete pillar. CP 1006. There were no eyewitnesses to the accident. CP 894-95. Individuals who came upon the accident scene called 911. CP 779-88. Auburn and Kent Police Department officers who responded to the scene found the bodies of five young people who had been ejected from the car. CP 773-75, 808-10. Inside the car they found Stewart in the driver's seat and appellant in the front passenger seat. CP 774-75. Appellant was the sole survivor of the accident. CP 774. She was transported to the hospital, where she was treated over a lengthy time for extensive injuries. CP 850, 868, 895, 911-12.

During the subsequent investigation, police found a video camera in the car. CP 862. Within the camera was a video recording. CP 862. The

videotape consisted of four parts: the first showed sequences at an unknown location; the second part showed sequences at a convenience store; the third part showed a party that purportedly occurred at the apartment appellant shared with her mother, fiancé, and four-year old daughter; and the fourth part showed a sequence that appellant purportedly shot from the passenger seat of the car before the accident. CP 1187-92, 1260. The Respondent's investigation also established that appellant, Stewart, and all but one of the passengers had consumed alcohol, and that Stewart was speeding and driving erratically. CP 915-16, 1177-82.

On July 10, 2002, the respondent charged appellant as an accomplice to driving under the influence of alcohol (hereinafter referred to as "DUI"), as an accomplice to reckless driving (both under RCW 9A.08.020), and to furnishing alcohol to a minor. The respondent's theory of criminal liability was that appellant bore

accomplice liability for the accident because her use of the video camera aided, promoted, and encouraged others, including the driver, to act outlandishly. CP 760. Subsequently, the respondent filed an additional charge of furnishing tobacco to a minor. Trial commenced on January 27, 2003. CP 206, 212. On January 30, at the close of the respondent's evidence, appellant moved to dismiss the DUI and reckless driving accomplice liability charges. CP 573-74. Appellant argued that the respondent presented insufficient evidence that she knowingly encouraged driving under the influence. CP 573-78. Appellant also argued that due to her injuries, she was a "victim" under any applicable statute and that she therefore was not an accomplice under RCW 9A.08.020(5). CP 576-78. The trial court found that there was sufficient evidence to present a jury question regarding appellant's alleged knowing encouragement. CP 582.

But the court agreed that appellant was a "victim" and therefore not an accomplice to the DUI and reckless driving charge. CP 597-98. The court reasoned that RCW 9A.08.020(5) unambiguously states that a victim is not an accomplice; that factually it was irrefutable that appellant suffered extensive injuries requiring months of hospitalization and rehabilitation; that as one who sustained injuries as a direct result of the crime charged, she is a victim; and that while a jury could conclude that her conduct leading up to the accident was inappropriate, and may well have aided and abetted, there was no way a jury could find that appellant was not also a victim of Stewart's reckless and drunken driving. CP 597-98. The court dismissed the reckless driving and DUI charges. CP 598.

The respondent sought a continuance of trial to allow it to immediately seek a writ of review in the superior court. CP 598-600. The parties

and the court agreed that the issue of a victim's potential accomplice liability was an issue of first impression. CP 598-99. The court recessed the trial for several days. CP 602, 604, 610.

The next day, January 31, the respondent filed a petition for a writ of review. The King County Superior Court rejected appellant's argument that the petition was barred by double jeopardy and stayed the trial. RP 2/3/03, 10-14. The court found that appellant was a victim of vehicular assault, not DUI and reckless driving, and that RCW 9A.08.020(5) would apply only to vehicular assault. RP 2/5/03, 30-32. The court concluded that continuation of the jury trial was not barred by double jeopardy, reversed the trial court order dismissing the reckless driving and DUI charges, reinstated the charges, and remanded for continuation of trial. RP 2/5/03, 12-14, 30-34.

Appellant immediately filed a notice of discretionary review and moved for a stay. A commissioner denied the motion for a stay. Appellant filed her motion for discretionary review with the Court of Appeals.

In the meantime, trial resumed in Auburn Municipal Court and appellant was convicted of DUI as an accomplice, furnishing alcohol to a minor, and furnishing tobacco to a minor. CP 162-64. She was acquitted of reckless driving as an accomplice. CP 162. Appellant appealed to the King County Superior Court under the Rules of Appeal for Courts of Limited Jurisdiction (RALJ). CP 1. Court of Appeals Commissioner Craighead stayed consideration of appellant's motion for discretionary review until the RALJ appeal was concluded.

On September 9, 2004, the King County Superior Court on RALJ appeal rejected numerous challenges by the appellant and affirmed the trial court on the following issues:

(1) delay in filing charges; (2) alleged discovery violations; (3) the request to sever trial of the charge of furnishing alcohol to a minor; (4) whether the accomplice liability theory implicated a first amendment right; (5) admission of the photographs of the accident scene; (6) admission of evidence related to the Total Station Map; (7) motion to dismiss for insufficiency of the evidence; (8) alleged prosecutorial misconduct during closing argument relating to alleged sexual misconduct by Appellant; and (9) alleged prosecutorial misconduct during closing related to a "new" theory of accomplice liability tied to seating arrangements in the car.

CP 1256. But the Court concluded that the trial court abused its discretion in refusing to sever the furnishing tobacco to a minor charge from the other charges, allowing the jury to hear the 911 tape, and admitting part three of the videotape showing appellant's daughter smoking. CP 1256-59.

The Superior Court concluded that the cumulative effect of the errors required a new trial and reversed and remanded for a new trial consistent with the decision. CP 1259. On September 27, 2004, the respondent filed a

notice of discretionary review. On November 2, appellant filed a cross notice of discretionary review. On January 28, 2005, Court of Appeals Commissioner Neel granted Appellant's motion for discretionary review¹ while passing respondent's motion for discretionary review to the panel hearing appellant's appeal and striking appellant's cross motion for discretionary review.

C. ARGUMENT

1. APPELLANT WAS VICTIM OF TOM STEWART'S

CRIME OF DUI.

Under the plain language of RCW 9A.08.020(5), the appellant could not be an accomplice to the crime of DUI if she was a victim of that crime. In its complaint charging the appellant with the crimes of DUI and

¹ One of the issues considered by Commissioner Neel was the availability of an interlocutory writ of review sought by the respondent. Appellant chooses to avoid relying upon the procedural error in granting the writ in favor of addressing the substantive issues of accomplice as a victim and double jeopardy.

reckless driving, the respondent pled its theory of accomplice liability under RCW 9A.08.020. Within this complicity statute, RCW 9A.08.020(5) provides:

Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

- (a) He is a victim of that crime; or
- (b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

Upon the appellant's motion, the trial court found that the language of the statute was clear on its face and that the evidence presented at trial was clear that the appellant suffered substantial bodily injury and, thus, was a victim. CP 597-98. The respondent ultimately obtained a review of this decision and obtained a contrary ruling from the Superior Court and an order reinstating the charges. RP 2/5/03, 32-34.

Interpretation of statute is a matter of law that is reviewed de novo. Castro v. Stanwood

School Dist. No. 401, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). In construing a statute, the court's objective is to determine the legislature's intent; if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (Citing Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). Further, a statutory term that is left undefined should be given its usual and ordinary meaning and courts may not read into a statute a meaning that is not there. State v. Hahn, 83 Wn. App. 825, 832, 924 P.2d 392 (1996). The "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Jacobs, at 600 (Citing Wash. Pub. Ports Ass'n v. Dep't of

Revenue, 148 Wn.2d 637, 645, 62 P.3d 462 (2003)).

No statute within Title 9A sets forth a statutory definition of "victim." Within the general definitions found in the Sentencing Reform Act, RCW 9.94.030(47) defines "victim" as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." Within the general definitions found in the Crime Victim's Compensation Act, RCW 7.68.020(3) defines "victim," in pertinent part, as "a person who suffers bodily injury or death as a proximate result of a criminal act of another person." To the extent that the plain meaning of the word "victim" could not be readily discernable, these statutory definitions are sufficiently accurate. A standard dictionary definition of "victim" states:

1. A living being offered as a sacrifice in a religious rite.
2. An individual injured or killed (as by

disease or accident). 3. A person cheated, fooled, or injured.

Merriam-Webster Dictionary, Home and Office Edition (1998). The emphasis of these definitions is that a person's injury resulted from the wrongful act of another. There is no dispute from the evidence presented at trial that appellant's injuries were an actual and proximate result of Mr. Stewart's drunken and reckless driving.

The language of the RCW 9A.08.020 is clear. A statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Nevertheless, where language is ambiguous, the rule of lenity requires construction in defendant's favor. State v. Roberts, 117 Wn.2d 576, 585, 817 P.2d 855 (1991). Fundamental fairness requires that a penal statute be literally and strictly

construed in favor of the accused although a possible but strained interpretation in favor of the State might be found. State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986). In this case, the favorable construction is that "victim" means a person who is injured as a result of the criminal acts of another. Such a finding under the circumstances of this case is consistent with the intent of the Legislature. In punishing those convicted of DUI, the Legislature specifically states:

In addition to penalties that may be imposed under RCW 46.61.5055, the court may require a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 or who enters a deferred prosecution program under RCW 10.05.020 based on a violation of RCW 46.61.502 or 46.61.504, to attend an educational program focusing on the emotional, physical, and financial suffering of victims who were injured by persons convicted of driving while under the influence of intoxicants.

RCW 46.61.5152 (emphasis added). This statutory provision is a clear expression of legislative intent that DUI is a crime with victims.

When the trial court considered appellant's motion to dismiss, the respondent argued to the judge as follows:

"If there was one singular victim - I would submit there were two victims in this case that are unquestionably the victims, Jayme and April."²

CP 586. It is readily apparent that this argument is ill-conceived. The suggestion that two passengers who were killed were victims, but a passenger who only spent days in a coma and months in the hospital and rehabilitation was not is ridiculous. The respondent also argued:

"If the defendant is a victim, I would submit, Your Honor, that a person who was in a joyride and scratched their finger, getting out of the car, [would] be a victim if they weren't the driver?"

CP 593. Judge Burns had no trouble rejecting these specious arguments, stating:

"I think being in an automobile and having your car wrapped around a pillar of an abutment as a result of a drunken driver and a reckless driver, and then spending months in a hospital, in rehabilitation, clearly constitutes

² Referring to Jayme Vomenici and April Byrd, who were two of the six persons killed in the traffic accident.

being a victim of a crime. The statute's clear. I cannot see how a jury could possibly conclude that Ms. Hedlund isn't a victim."

CP 597-98. The trial court's statutory interpretation was correct and the Superior Court erred in reversing the ruling based on the plain language of the complicity statute.

2. DUI IS NOT A VICTIMLESS CRIME

The primary basis for the Superior Court's reversing the trial court's ruling was that DUI is, essentially, a victimless crime. RP 2/5/03, 31. It found that the term "victim," as contained in RCW 9A.08.020, means someone injured as a result of a crime specifically designated as a crime against persons or property. RP 2/5/03, 31. Thus, the Superior Court reasoned that the appellant could only have been a victim of vehicular assault, not DUI or reckless driving. RP 2/5/03, 31.

This case certainly presents some unique factual and legal circumstances. Nevertheless,

in the context of evaluating sentencing factors or restitution, our courts have previously found victims of supposedly "victimless" crimes, whether or not those victims are readily identifiable or the harm foreseeable. In State v. Ehli, 115 Wn. App. 556, 62 P.3d 929 (2003), the defendant was convicted of several counts of dealing in, and possession of, depictions of a minor engaged in sexually explicit conduct. At sentencing, Ehli argued that his possession of child pornography was a victimless crime because the subjects had no individual subjective awareness of any particular instance of internet downloading and the State could not identify the particular victims depicted. Id., at 560. The Court of Appeals flatly rejected this argument holding that knowingly possessing child pornography constitutes sexual exploitation, and such exploitation victimizes that child. Id., at 560-61. The Court then endorsed the view that children that are exploited by pornographers

"are victims who suffer physiological, emotional and mental damage" and such a child's knowledge that such photographs are distributed "increases the emotional and psychic harm suffered." Id., at 561.

In State v. Coe, 86 Wn. App. 841, 939 P.2d 715 (1997), defendant was convicted of manufacturing a controlled substance and the trial court ordered him to pay \$38,322 in restitution to the owners in the rental home where his marijuana grow operation was housed. Coe appealed the order arguing that growing marijuana was a victimless crime and that the State's failure to charge him with vandalism, or some other crime that included an element of property damage, made restitution inappropriate. Id., at 843. The Court of Appeals rejected the defendant's argument, reasoning that restitution was proper when the property damage was an actual and proximate result of defendant's wrongful conduct. Id., at 844. The Court held

that "there was a sufficient causal connection between the crime charged and the victim's damage." Id., at 844.

In State v. Forbes, 43 Wn. App. 793, 719 P.2d 941 (1986), three defendants were convicted of the crimes of professional gambling. The prosecution was based upon evidence gathered by an undercover detective from King County Sheriff's Office who participated in "after hours" card games. Id., at 794-795. Ultimately, the Court of Appeals affirmed the trial court's characterization of the King County Department of Public Safety as a victim in ordering restitution for the detective's gambling losses during the investigation. Id., at 800. As these cases show, the absence of a "victim" within the statutory definition of the defendant's crime of conviction does not foreclose a finding that an individual injured by the defendant's criminal conduct is a victim for the purpose of doing substantial justice.

The suggestion that DUI is a victimless crime defies logic and common sense. Thousands of people are injured and killed each year by drunk drivers, health care and insurance costs have escalated, and the negative ripple effect upon families is immeasurable. The respondent cannot alter the fact that an injured passenger in a car wrecked by a drunk driver is a victim simply because the driver was killed, or, if the driver had survived, was not charged with vehicular assault. The injured passenger is still a victim of an intoxicated person's driving and no amount of wordsmithing can alter that reality. That same reality precludes such an injured person from being charged as an accomplice, even if such charges would be arguably supportable in absence of such injuries. Any other tortured reading of RCW 9A.08.020 is unsupported.

Finding that the appellant is barred from prosecution as an accomplice is consistent with

the notion that her substantial physical and psychological injury is, in and of itself, sufficient punishment for any potentially wrongful conduct. It is also consistent with the notion that attempting to criminally prosecute a seriously injured person for the unlawful conduct of another person does not accomplish the ends of justice.

**3. DOUBLE JEOPARDY PRECLUDED COMPLETION OF THE
DUI ACCOMPLICE TRIAL FOLLOWING DISMISSAL OF
THAT CHARGE.**

The trial court's grant of appellant's motion to dismiss after respondent rested precluded further proceedings on the charges of DUI and reckless driving because of the Constitutional prohibition on double jeopardy. Article I, section 9 of the Washington State Constitution provides that "no person shall ... be twice put in jeopardy for the same offense," while the Fifth Amendment of the United States

Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause of the State Constitution provides no greater protection to citizens than the Federal Constitution and is subject to the same interpretation. State v. Glocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

The trial court's dismissal was a judgment of acquittal based on sufficiency of the evidence; perhaps not in the traditional sense, but rather based upon the court's factual determination upon undisputed facts that reasonable minds could not differ that appellant had an absolute defense to the charge. Because of the nature of the charge, there were numerous factual elements respondent was required to prove beyond a reasonable doubt: Tom Stewart drove a vehicle in the City of Auburn, while under the influence of intoxicating liquor, with willful or wanton disregard for persons or

property, and that appellant; with knowledge that she was promoting the crimes of DUI and reckless driving, solicited, aided or encouraged Stewart to commit the crimes by her affirmative conduct. Based on the court's interpretation of RCW 9A.08.020, respondent was required to prove that appellant was not a victim of Stewart's crimes of DUI and reckless driving. Essentially, this was an affirmative defense, which the respondent was required to prove the absence of beyond a reasonable doubt. Thus, had appellant walked away from the wreck and merely scratched her finger while getting out of the car, perhaps the trier of fact would have had to deliberate on the issue of her victim status. Based on the evidence actually presented at trial, absent the dismissal, appellant would have been entitled to a jury instruction on this issue (not unlike a self-defense instruction in an assault case when the defendant presents evidence of reasonable fear of imminent bodily harm). Under the same

complicity statute, a person accused as an accomplice could present evidence that she terminated her complicity and made a good faith effort to prevent the crime before its commission. RCW 9A.08.020(5)(b). If such evidence of a defendant's attempts to terminate the criminal enterprise were presented at trial, it would be reasonable for the defendant to raise that defense and expect an appropriate instruction for a factual determination by the jury.

In dismissing the accomplice charges, the trial court made the factual determination that sufficient evidence had been presented that appellant suffered substantial bodily injury and that, when a victim is defined as someone who suffers injury as a result of the criminal conduct, no reasonable jury could find that appellant was not a victim. CP 597-98. Thus, the court's finding was based in part upon sufficiency of the evidence.

Jeopardy attaches when the defendant is put to trial and jury is impaneled and sworn. State v. Jones, 26 Wn. App. 1, 6, 612 P.2d 404 (1980), State v. Smith, 15 Wn. App. 725, 729-730, 551 P.2d 765 (1976). When the prosecution's case is dismissed for insufficiency of evidence, even if the determination is erroneous, jeopardy has attached. State v. Matuszewski, 30 Wn. App. 714, 637 P.2d 994 (1981), State v. Bundy, 21 Wn. App. 697, 587 P.2d 562 (1978). The dismissal operates as a judgment and jeopardy attaches. State v. Jubie, 15 Wn. App. 881, 552 P.2d 196 (1976). When jeopardy has attached, any further proceedings are barred by the Double Jeopardy Clause of the Constitution.

In the instant case, no formal written order of dismissal was signed by the trial judge. There have been a few reported cases dealing with the issue of when a judge's decision becomes final for double jeopardy purposes in this context. The case of State v.

Collins, 112 Wn.2d 303, 771 P.2d 350 (1989) discussed the standard established in State v. Dowling, 98 Wn.2d 542, 656 P.2d 497 (1983), which was:

A finding by the court as the trier of fact, without a jury, when read conclusively into the record in such a manner as to indicate that it is neither tentative nor made with reservation or advisement nor subject to further consideration or proceedings in the same case, will support a judgment or acquittal or dismissal.

Dowling, at 547 (quoting State v. Bastinelli, 81 Wn.2d 947, 506 P.2d 854 (1973)). In abandoning this standard, the Supreme Court in Collins stated it's preference for the oral ruling to be reduced to written form by stating: "To serve the ends of certainty, reliance on the final written court order or written journal entry to determine the finality of a ruling is the better rule." Collins, at 308. Ultimately the court held that "[w]e return to the rule long followed in this state that a ruling is final only after it is signed by the trial judge in the journal

entry or is issued in formal court orders.”
Collins, at 308.

In the case at bar, the trial court clearly rendered a decision on appellant’s motion to dismiss. The Municipal Court’s docket contained an entry stating: “01 30 2003 ... Judge makes his ruling. Grants motion to dismiss DUI and reckless driving charge.” CP 597-98; Appx. A. It is unclear if the Auburn Municipal Court employs a written “journal” contemplated by the Collins decision. The Washington Supreme Court’s decision in Mackay v. Mackay, 55 Wn.2d 344, 347 P.2d 1062 (1959) suggests that a “docket entry” is the same as a “journal entry.” In reviewing the trial court judge’s decision to set a future court date in a domestic relations proceeding and endeavoring to ascertain the meaning of the phrase “subject to call,” the court used the phrases “docket entry” and “journal entry” interchangeably. Mackey, at 348-349. Also, other court opinions have endorsed the notion of a

docket entry being proper documentation of a judge's decision. Harkins v. Justice Ct., 34 Wn. App. 508, 662 P.2d 403 (1983) (continuance requested by defense counsel and approved by judge sufficient to effect waiver of speedy trial rule), State v. Everett Dist. Ct., 24 Wn. App. 58, 59, 600 P.2d 586 (1979) (appeal taken from trial court's dismissal of DUI charge for untimely initial appearance).

To hold the Auburn Municipal Court to the standard set forth in Collins would be a triumph of form over substance. The record of the proceedings is clear that the trial judge gave careful consideration to appellant's motion to dismiss based upon her victim status. CP 574-98. After denying the appellants companion motion to dismiss the accomplice charges for insufficiency of the evidence (regarding intent and affirmative conduct), the trial judge stated that he would consider it over the lunch hour and conduct his own legal research. CP 582-83.

The respondent was given the opportunity to present contrary authority and argument to the court. CP 584-95. After the parties presented argument, the trial court clearly set forth its reasoning on the record and was clear and unequivocal in its ruling. CP 597-96. There can be no doubt from the record that the court considered the law and evidence and dismissed the DUI and reckless driving charges. The dismissal was clearly recorded in the court's case docket. Appx. A. Accordingly, once the ruling granting the motion to dismiss was announced, any further proceedings attempting to secure a conviction of the appellant on the DUI and reckless driving charges were barred by double jeopardy.

As alluded to above, a proper double jeopardy analysis requires an accurate characterization of the trial court's decision on appellant's motion to dismiss. Admittedly such a determination is challenging on the

record presented. The trial court's decision was essentially based on a mixed question of law and fact. While appellant could have cloaked such an issue within a pretrial Knapstad motion³, she had to determine what evidence would actually be admitted at trial.

For the trial judge to recess the trial to allow the respondent the quickly obtain a second judicial opinion from the Superior Court was akin to the situation presented in a recent U.S. Supreme Court decision. In Smith v. Massachusetts, 543 U.S. 462, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005), the defendant was on trial on charges relating to the shooting of his girlfriend's cousin. During defendant's jury trial, one of the counts against him, unlawful possession of a firearm, was dismissed for insufficiency of the evidence at the close of the prosecution's case for failure of proof on

³ Under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), the trial court may dismiss a prosecution on a pretrial motion for insufficient evidence.

an element. Id., 543 U.S. at 464-65. The trial court marked defendant's motion with the handwritten endorsement "Filed and after hearing, Allowed," and the allowance of the motion was entered on the docket. Id., 543 U.S. at 465. After the defense presented its case and rested, the trial judge reversed her prior dismissal after the prosecutor presented favorable authority. Id., 543 U.S. at 465-66. The previously dismissed charge was presented to the jury, who convicted the defendant. Id., 543 U.S. at 466. Upon review, the U.S. Supreme Court reaffirmed its long-held position that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict. Id., 543 U.S. at 466-67. An order entering such a finding (insufficient evidence as a matter of law) meets the definition of acquittal that double jeopardy cases have consistently used: It

"actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Id., 543 U.S. at 467-68, United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). In considering whether the trial court's ruling was final, the U.S. Supreme Court opined that while no state had set out a definition by statute or court rule as to when a judge's mid-trial ruling was final, it noted that a small few states had defined such as determination in their common law, citing State v. Collins as one of three examples. Smith v. Massachusetts, 543 U.S. at 470-71. In reasoning that states can protect themselves against erroneous mid-trial acquittals by crafting appropriate procedural rules, the Court conclusively stated:

[A]ny contention that the Double Jeopardy Clause must itself (even absent provision by the State) leave open a way of correcting legal errors is at odds with the well established rule that the bar will attach to a pre-verdict acquittal that is patently wrong in law.

Smith v. Massachusetts, 543 U.S. at 470-71.

In the present case, the trial judge did not rethink his decision on a motion for reconsideration or on his own accord. Rather, had his mind changed for him. Despite any technical or procedural shortcomings in the record in the present case, the record is clear substantively that the trial court's ruling was clearly an acquittal based on a correct interpretation of the applicable statute. Therefore, any further proceedings were barred by the constitutional prohibition against double jeopardy.

D. CONCLUSION

The language of RCW 9A.08.020 is clear on its face. The evidence of appellant's substantial bodily injury was undisputed. The trial made a legally and factually correct ruling when it granted appellant's motion to dismiss the DUI and reckless driving charges at

the close of respondent's case. Further, jeopardy attached to the appellant at the time of the trial court's decision, barring any further proceedings on the dismissed charges. Therefore, appellant's conviction for DUI should be set aside and the respondent's criminal complaint dismissed with prejudice.

DATED this 30th day of March, 2006.

Respectfully Submitted



MATTHEW VALEN HONEYWELL

WSBA #28876

Attorney for Appellant

APPENDIX A

Copy of Relevant Auburn Municipal Court Docket

Attached as Exhibit A to Letter Dated January 18, 2005 from
Mr. Daniel B. Heid, Attorney for City of Auburn, to
Commissioner Mary S. Neel, Court of Appeals, Division I.

01/18/05 08:33:01

DD1000MI Case Docket Inquiry (CDK)

AUBURN MUNICIPAL

PUB

Case: C00078961 AUP CT Csh:

Pty: _____ StID: _____

Name: _____ NmCd: _____

Name: HEDLUND, TERESA A

Cln Sts:

DUI

RECKLESS DRIVING

Note:

Case: C00078961 AUP CT Criminal Traffic

N

01 29 2003 0499	CITY REBUTTAL	SLH
0600	ATY CAMPBELL	SLH
	ATY MONTGOMERY	SLH
0963	JUDGE BURNS MAKES A FINDING THAT THE CITY HAS NOT	SLH
	PROVIDED CERTIFICATIONS FOR THE BOOD VIALS HOWEVER THERE IS	SLH
	TESTIMONY FROM BOTH THE MEDICAL EXAMINER AND THE STATE TOX	SLH
	HE STATES THIS MEETS THE STANDARD REQUIREMENTS	SLH
1138	JURORS PRESENT	SLH
1140	CITY RESUMES WITH STATE TOXICOLOGIST	SLH
1282	CITY OFFERS EXHIBIT #38,39 ADMITTED AND PUBLISHED	SLH
	CITY OFFERS EXHIBIT #40 MARKED (VOMINICI BLOOD RESULTS)	SLH
1499	RECESS FOR THE DAY	SLH
01 30 2003	TAPE NO 15	GXC
	TP CT 20 JUDGE ADDRESS MOTION TO DISMISS	GXC

D0071I More records available.

DD1000PI

01/18/05 08:33:04

DD1000MI Case Docket Inquiry (CDK)

AUBURN MUNICIPAL

PUB

Case: C00078961 AUP CT Csh:

Pty: _____ StID: _____

Name: _____ NmCd: _____

Name: HEDLUND, TERESA A

Cln Sts:

DUI

RECKLESS DRIVING

Note:

Case: C00078961 AUP CT Criminal Traffic

N

01 30 2003 TP CT 48 PA HEID ARGUES MOTION	GXC
TP CT 605 JUDGE MAKES HIS RULING	GXC
GRANTS MOTION TO DISMISS DUI AND RECKLESS DRIVING CHARGE	GXC
TP CT 680 PA MONTGOMERY MOTIONS TO RESUME COURT ON MONDAY SO SHE CAN FILE WRIT	GXC
TP CT 687 ATY CAMPBELL HAS NO OBJECTION	GXC
COURT WILL RESUME MONDAY AFTERNOON	GXC
HEDLUND TRIAL TAPES 12 THRU 13	JKC
WITNESS SCHEKE RETAKES STAND-DE BY MONTGOMERY	JKC
CE CAMPBELL	JKC
WITNIESS EXCUSED BUT REMAIN IN ATTENDANCE	JKC
WITNESS PAULA HARWOOD-DE MONTGOMERY	JKC
NO CE BY CAMPBELL-WITNESS EXCUSED	JKC
WITNESS ERIC LEVERENZ-DE MONTGOMERY	JKC

D0071I More records available.

DD1000PI

01/18/05 08:33:07

DD1000MI Case Docket Inquiry (CDK)

AUBURN MUNICIPAL

PUB

Case: C00078961 AUP CT Csh:

Pty: _____ StID: _____

Name: _____

NmCd: _____

Name: HEDLUND, TERESA A

Cln Sts:

DUI

RECKLESS DRIVING

Note:

Case: C00078961 AUP CT Criminal Traffic

N

01 30 2003 VOIR DIRE OF WITNESS BY CAMPBELL	JKC
DE CONTINUES-CE CAMPBELL	JKC
WITNESS EXCUSED SUBJECT TO RECALL	JKC
CITY WILL PRESENT VIDEO-CAMPBELL OBJECTS STATE FOUNDATION	JKC
HAS NOT BEEN PROPERLY LAID-MONTGOMERY ARGUES THE CITY HAS	JKC
LAID PROPER FOUNDATION-JUDGE BURNS RULES PROPER FOUNDATION.	JKC
HAS BEEN LAID	JKC
VIDEO SHOWN-CITY RESTS THEIR CASE	JKC
CAMPBELL MOVES TO DISMISS-STATING CITY HAS FAILED TO PROVE	JKC
HEDLUND WAS AN ACCOMPLICE	JKC
CAMPBELL STATES HEDLUND WAS ALSO A VICTIM NOT AN ACCOMPLICE	JKC
MONTGOMERY ASKS THE COURT TO DENY THE DISMISSAL	JKC
JUDGE GRANTS MOTION TO DISMISS-CITY REQUESTS THEY BE ALLOWED	JKC
TO REQUEST WRIT FROM SUPERIOR COURT TO STAY RULING-GRANTED	JKC

APPENDIX B

Copy of Relevant portions of Report of Proceedings
cited in Argument

Auburn Municipal Court - January 20, 2003

<u>Cited in</u> <u>Pg. of Brief</u>	<u>Report of</u> <u>Proceedings</u>	<u>Clerk's</u> <u>Papers</u>
10	805-06	597-98
15	794	586
15	801	593
16	805-06	597-98
27	805-06	597-98
29	790-91	582-83
29	792-803	584-95
29	805-06	597-98

King County Superior Court - February 5, 2003

<u>Cited in</u> <u>Pg. of Brief</u>	<u>Report of</u> <u>Proceedings</u>	<u>Clerk's</u> <u>Papers</u>
10	32-34	n/a
16	31	n/a
16	31	n/a
16	31	n/a

City of Auburn v. Hedlund
Trial - Day 4

Page 781

1 with Mr. Leverenz at this time.
2 MR. CAMPBELL: No cross.
3 THE COURT: All right, sir. You may be excused
4 from the stand.
5 And need he remain in attendance or is he free to
6 go?
7 MS. MONTGOMERY: He's free to go now but remain
8 in attendance.
9 THE COURT: All right, sir, you're free to go.
10 (Video played to end and stopped.)
11 MS. MONTGOMERY: Permission (indiscernible)?
12 THE COURT: No, I don't think I'm going to do
13 that.
14 MS. MONTGOMERY: Your Honor, the City would rest
15 its case.
16 THE COURT: All right.
17 Mr. Campbell?
18 MR. CAMPBELL: Thank you, Your Honor. I have a
19 motion to bring.
20 THE COURT: All right. Would the bailiff escort
21 the jurors back in the jury deliberation room?
22 UNIDENTIFIED SPEAKER: Please rise.
23 (Pause.)
24 THE COURT: Please be seated.
25 UNIDENTIFIED SPEAKER: Your Honor, could we have

Page 782

1 just a moment (indiscernible)?
2 THE COURT: This would be a good time to do
3 that.
4 Mr. Campbell?
5 MR. CAMPBELL: Thank you, Your Honor.
6 The City having rested, the defense would move to
7 dismiss this case based on the sufficiency of the
8 evidence. It's clear from the holding of State v. Roberts
9 that the prosecution has a responsibility - this motion is
10 pertinent to the driving offenses that are charged under
11 the accomplice liability. And it's clear under the
12 holding of Roberts that the City has a responsibility to
13 prove beyond a reasonable doubt that Ms. Hedlund knowingly
14 encouraged, solicited, and baited in some way the target
15 crime in such a way as to make it her crime, and to join
16 in that criminal intent. The evidence that's been offered
17 thus far in the City's case in chief simply does not meet
18 that standard.
19 Here we have a situation where the evidence that's
20 been offered shows that there was a party that led up to
21 the time of driving, but there is no information. The
22 information is entirely lacking to show that she
23 encouraged the driving of Tom Stewart in any way. In
24 fact, the videotape, if you noted during the playing of
25 the videotape, there's only a short segment while the car

Page 783

1 is actually at a stop - from what I can tell, it's at the
2 intersection of C Street and Main Street here in Auburn -
3 that the camera's actually trained on the driver. And
4 during that sequence there is a moment where the driver
5 makes a face for the camera but, other than that, it's
6 clearly trained on the occupants in the back seat, and
7 there is no additional information that would suggest that
8 the use of a video camera in and of itself is the type of
9 act that would cause the encouraging that the City has
10 alleged both in its complaint and in its probable cause
11 statement and in its (indiscernible) particulars.
12 The testimony of Officer Lowery - or Sergeant Lowery,
13 yesterday, was that his view of the videotape suggested
14 that what was really taking place leading up to the
15 accident was that the driver was trying to frighten the
16 passengers in the car. Clearly, that would take out of
17 the equation the use of the video. You don't hear any
18 statements by Teresa Hedlund, during the course of this
19 video clip, saying anything to Tom Stewart, encouraging
20 him to drive in one manner or another.
21 And today you heard the testimony of Eric Leverenz,
22 who testified that he had no information. He is our sole
23 witness to what happened just as they were getting into
24 the car. And the City's evidence is void of any
25 information that would suggest that Teresa Hedlund is the

Page 784

1 person that encouraged Tom Stewart to take the wheel.
2 Quite the opposite, it appears that the keys were held by
3 Jayme Vomenici. We have her testimony that she drove the
4 car earlier in the day. We have no explanation for how
5 the keys came into Tom Stewart's hands other than by Jayme
6 handing them to Tom Stewart. An act that's completely
7 void of any information associated with Teresa Hedlund.
8 Mr. Leverenz testified that the discussion was really
9 about whether Marcus Cooper or Tom Stewart were going to
10 be the driver. Again, no information designating
11 Teresa Hedlund as being the person getting Tom Stewart
12 behind the wheel of the car. And clearly, the videotape
13 starts after the point in the time of driving, as far as
14 that portion of it that's associated with the time of
15 driving, so, to suggest that the videotape itself
16 encourages him to then be a driver under the influence is
17 without factual support in this case.
18 So I move to dismiss based on the insufficiency of
19 the evidence.
20 I also have reviewed the statute regarding accomplice
21 liability, and the statute, in Subsection 5, indicates
22 that a person is not an accomplice - it reads: "Unless
23 otherwise provided by this title or by the law defining
24 the crime, a person is not an accomplice in a crime
25 committed by another if he is a victim of that crime."

City of Auburn v. Hedlund
Trial - Day 4

Page 785

1 Now, there are various definitions of a victim in the
2 law, and they are essentially in the Crime Victims'
3 Compensation Act chapter. The crime victim - the chapter
4 that defines what a victim is for purposes of being able
5 to avail one's self of the opportunities to have the
6 assistance of a victim's advocate and the types of
7 responsibilities the Court may have with respect to a
8 victim of a crime. And then, of course, there's a
9 definition of a victim that's contained in the Sentencing
10 Reform Act, which is the definition - you can pick any of
11 these definitions, as far as I'm concerned, I don't think
12 that there's any controversy but that Teresa Hedlund is a
13 victim in this case.

14 In fact, the testimony in this case, from Detective
15 Harmon, who was the lead investigator in the case, is that
16 Teresa Hedlund, during the entire course of the
17 investigation, was never considered a suspect in this
18 case. She was a victim. That's how Detective Harmon
19 described her. And, of course, every witness who's
20 actually had an opportunity to view the accident scene, in
21 the testimony you heard Ms. Roselle talk about the
22 condition of Ms. Hedlund at the accident scene, clearly,
23 that would suggest that she was injured in the accident
24 and that she's a victim. Assuming, arguendo, that
25 Tom Stewart drove drunk or drove in a reckless manner, the

Page 786

1 injuries that Teresa Hedlund suffered qualify her as a
2 victim of those crimes.

3 Some of Ms. Roselle's testimony about what
4 Ms. Hedlund's appearance was, the testimony that the Court
5 has received about - that Ms. Hedlund had to be removed
6 from the scene and taken to Harborview, Detective Harmon's
7 testimony about seeing her in the nursing home, with the
8 halo, because she had suffered head injury, two months
9 later in the nursing home. There is absolutely, to my
10 mind, no way that the City could suggest that
11 Teresa Hedlund is not a victim in this case. And for that
12 reason, Your Honor, additionally, I would be asking the
13 Court to dismiss these driving offenses against
14 Ms. Hedlund.

15 THE COURT: Thank you, Mr. Campbell.
16 Ms. Montgomery?

17 MS. MONTGOMERY: In half the motion to dismiss,
18 the Court must look at the evidence in the light of - most
19 favorable to the nonmoving party, which is the City at
20 this time. Your Honor, Ms. Hedlund is not a victim if she
21 makes herself be one. The evidence has shown,
22 indisputably, when you look at the tape, that she was
23 kneeling on the passenger seat of the car, without a seat
24 belt on. She was the farthest away from the impact.
25 Your Honor, had she had her seat belt on and had she been

Page 787

1 seated where she should have been in that vehicle, she may
2 not have suffered any injuries at all. She cannot make
3 herself a victim and then claim that because she made
4 herself a victim that charges should not ensue.

5 Additionally, Your Honor, the record is replete with
6 evidence that shows that she aided Tom Stewart in driving
7 drunk. The first piece of evidence, and probably most -
8 the strongest piece of evidence is that she lived at that
9 apartment. They, by the testimony, were going to go off
10 and get more beer or some food. Your Honor, she had no
11 reason to leave where she was living. The very fact that
12 she got in that car forced the issue. It forced someone
13 other than Jayme Vomenici to drive.

14 You have her testimony about heights and weights of
15 the various individuals. Jayme Vomenici was the smallest
16 individual. There is nobody else who could have gone in
17 that back seat besides Jayme Vomenici and April Byrd. And
18 by Teresa getting into that car, forced the issue. The
19 issue that Jayme, the only sober person, could not be
20 driving.

21 Teresa told her mom that Jayme was going to drive.
22 And when Teresa got in that car, that couldn't have
23 happened. It would be physically impossible to stack
24 people up any differently than what they had them, in the
25 respect that the two smallest girls had to go on laps in

Page 788

1 the back.

2 Now, Your Honor, I would suggest, additionally, that
3 the video itself shows how she encouraged the driver. The
4 driver leans over and says, "Hey, look at me driving. You
5 got to record this shit, nigger." I mean, Your Honor,
6 come on, he is showboating for this camera.

7 And the other part, Your Honor, that I think is very
8 significant is that the aiding and abetting reckless
9 driving, the statute says, "Willful or wanton disregard
10 for safety of persons or property." It doesn't identify
11 who those persons or who that property is, as long as the
12 driver operates that motor vehicle in willful or wanton
13 disregard for safety of persons or property. That person
14 could be Teresa Hedlund. She assisted in that because she
15 knelt on that passenger seat, without a seat belt, holding
16 a video camera that did not belong to her. Had he put on
17 the brakes, she could have dropped it and broke it. Had
18 he crashed into a pillar, she could have injured herself.
19 She put herself in that position. Nobody else did.

20 Now, Your Honor, the City would suggest that we have
21 met our burden in this case. I could go on and on and
22 on. The evidence is there. The only other thing I would
23 say about the victim, the reckless driving, the DUI
24 happened well before the crash.

25 With all due respect to the family and the tragedies

21 (Pages 785 to 788)

City of Auburn v. Hedlund
Trial - Day 4

Page 789

1 that they have suffered, if this case had not resulted in
2 the death of six people, we would still be here today.
3 The reckless driving happened from the start, up to the
4 finish. And any point along that roadway, along that path
5 that they took, she assisted in aiding him in recklessly
6 driving. She assisted in aiding him in driving drunk.
7 The fact that it eventually crashed is the consequence,
8 but it isn't the crime in and of itself, Your Honor, and I
9 would ask you to deny the motion to dismiss.
10 THE COURT: Mr. Campbell?
11 MR. CAMPBELL: Your Honor, there's no legal
12 support for the proposition that Ms. Hedlund is not a
13 victim because she made herself one. She did not make
14 herself a victim in this case. And to suggest that she's
15 not a victim, number one, is absent in the facts of this
16 case. I can't believe that the City would be heard to
17 suggest that after suffering severe head injuries and
18 going through what she's gone through in this case, she's
19 not a victim. It's just incredible to me. And to suggest
20 that you can divorce the - that you can fractionalize the
21 activities to say that, well, the act of driving under the
22 influence and the act of reckless driving occurred prior
23 to the crash, and so the crash really doesn't count to
24 make her a victim, if that's true, then there's no purpose
25 in any of the testimony about any of the decedents in this

Page 790

1 case. And Your Honor has determined that that is relevant
2 evidence in this case. The outcome is just as pertinent
3 as to the factors leading up to it. The City cannot try
4 to divorce one from the other.
5 Suggesting that Ms. Hedlund knew that the conduct of
6 videotaping would encourage the act of driving under the
7 influence or that her presence in and of itself is the
8 type of contributory conduct that would make a person an
9 accomplice is clearly not supported by the law either.
10 And the City's briefs are replete with the quotation of
11 "mere presence" is not in and of itself sufficient to
12 make a person an accomplice.
13 The person has to do something to encourage some
14 affirmative thing in order to make it clear to the
15 principal that the crime that the principal is committing
16 is a crime that the accomplice undertakes is their own as
17 well. This is not the case in any of the evidence that's
18 been presented to this Court. We would accordingly ask
19 Your Honor to dismiss the charges.
20 THE COURT: Well, the Court, in determining
21 whether or not the City has met its burden to allow the
22 issue to go forward to a jury is a requirement of looking
23 at the facts in a fashion most favorable to the City. In
24 looking at those facts, I think the case - cases should be
25 allowed to go forward to the jury. I am, however, taken

Page 791

1 with the argument about the statute excluding, as a
2 defendant, someone who is a victim of a crime. And I'm
3 not prepared to rule on that at this time. I want to do
4 some research. And unfortunately, ladies and gentlemen, I
5 don't have a law library here nor do I have access to a
6 computer that would give me access to a library, so I'm
7 going to make a ruling after the lunch hour, and we'll
8 break early for lunch at this time.
9 MS. MONTGOMERY: Your Honor, could we have an
10 extended period, because we've just seen this brief this
11 morning. Certainly, we would like to provide argument as
12 well.
13 THE COURT: It's going beyond an hour and a
14 half?
15 MS. MONTGOMERY: I don't imagine so.
16 THE COURT: Pardon?
17 MS. MONTGOMERY: I don't imagine so.
18 THE COURT: I'm not quite sure what you mean
19 then, when you say, ""Could we have an extended period?"
20 MS. MONTGOMERY: Well, what time --
21 MR. HEID: What time would the Court want to
22 resume?
23 THE COURT: 1:00.
24 MS. MONTGOMERY: Okay. That's fine.
25 THE COURT: Court will be in recess until 1:00.

Page 792

1 UNIDENTIFIED SPEAKER: All rise.
2 (Lunch recess taken.)
3 (End of Side 1, Tape 13.)
4 (No Recording on Side 2, Tape 13.)
5 UNIDENTIFIED SPEAKER: All rise. The Auburn
6 Municipal Court is now in session. The Honorable Judge
7 Burns presiding.
8 THE COURT: Please be seated.
9 Looks like we're bereft a couple of attorneys.
10 Ms. Montgomery, Mr. Heid, did you get a copy of the
11 personal postjury instruction?
12 MS. MONTGOMERY: Yes, Your Honor. They were
13 right here, and somebody brought them over to my office,
14 which I appreciate.
15 THE COURT: All right. Good, good, good. And
16 when we broke, we were at the point where we had heard
17 defense counsel's motions. I'd made rulings on some of
18 them, but left the issue of the RCW 9A.08.020(5)(a) or is
19 it 9A.08.920, to do some research. I assume both parties
20 probably had a chance to do a little bit of that over the
21 break and, I will presume, want to be heard on the issue
22 having had that opportunity, so I will allow them to do
23 that.
24 Mr. Campbell, it's your motion. Did you have
25 anything you wanted to add to your motion that was

City of Auburn v. Hedlund
Trial - Day 4

Page 793

Page 795

1 previously argued?
2 MR. CAMPBELL: I don't, Your Honor. And I was
3 just reviewing the City's brief that they presented, so I
4 haven't had an opportunity to really digest that. So if I
5 could have a moment, I would appreciate it, and then the
6 City address the Court in the meantime.
7 THE COURT: All right. Ms. Montgomery?
8 MS. MONTGOMERY: I'll turn it over to Mr. Heid
9 for purposes (indiscernible).
10 THE COURT: Mr. Heid?
11 MR. HEID: Your Honor, first of all, I'm going
12 to apologize to the Court, because it's never my
13 preference to submit documents to the Court that are not
14 as complete as I wished they were. Because of the limited
15 timetable, I'm confident that there are probably
16 formatting and probably spelling errors as well. But,
17 Your Honor, the gist of the authorities that we have
18 provided do address the issue specifically.
19 And in this regard, to start off, the standard under
20 which the matter at hand is to be evaluated, the standard
21 of "what is the standard for a motion to dismiss the
22 City's case" is whether there are facts that a jury could
23 reasonably use to reach a verdict of guilty. And we've
24 that, Your Honor.
25 Then the question of, "Is the defendant a victim?"

1 I would submit, Your Honor, the defendant doesn't
2 fall into that category. The defendant not only complied
3 with the "get me on camera, I'm driving," she didn't even
4 respond reasonably well to Jayme's request that the car
5 stop. I would submit, Your Honor, for instance, when
6 Jayme says "stop the car, stay in your lane of travel,
7 stop, slow down," etc., the closest - the closest the
8 defendant got to even injecting herself is asking, "Do you
9 want me to drive?" And I would submit, Your Honor, that
10 is critical for this reason: If in fact the defendant had
11 the authority to do anything, like take control of the
12 car, ostensibly, what if Jayme had said, "I want you to
13 drive." However, the problem was, maybe the defendant's
14 ability to drive was no better than Tom's, even though,
15 maybe Tom was pushing the camera a little bit. But that
16 wasn't her request. She said, "no, I want the car to
17 stop." But did the defendant do anything more out of
18 that? Why, yes, she did. She said, "He's joking. He's
19 being silly," or words to that effect of.
20 I would submit Your Honor, the question must be then,
21 for the Court to evaluate, is whether the jury could
22 decide as to the drunk driving and the reckless driving,
23 whether the jury could believe, based upon the facts that
24 have been presented, that the defendant did something, did
25 anything, no matter how small, that promoted, encouraged

Page 794

Page 796

1 And in that regard, Your Honor, I'd point out, for the
2 purposes of this, if "victim" is relative, she's the only
3 one out of this entire accident that lived. However, if
4 the defendant were a victim, the question then must be, at
5 what point is she a victim? Was the defendant a victim
6 when she got into the car, knowing that Jayme wasn't going
7 to be driving, the only person who hadn't been drinking,
8 the person she told her mother would be driving? The
9 defendant told her mother, Jayme was going to be driving.
10 And was she a victim when she picked up the camera? Was
11 she a victim when she, not only her, but recorded and
12 complied with Tom's request, Tom, who - apologize to the
13 Court again - was "fucked up" and "liquored up?" - his
14 words. Knowing that he was in a condition that caused him
15 to describe himself that way, she, the defendant, got into
16 the car and used the camera in compliance with his request
17 to "get me on camera, I'm driving."
18 I would submit, Your Honor, this is not merely a
19 happenstance victim. If there was one singular victim - I
20 would submit there were two victims in this case that are
21 unquestionably the victims, Jayme and April. I would
22 submit, Your Honor, Jayme, because she obviously didn't
23 want to have the car going as fast as it was, and April,
24 because she was in no position to make a cognitive
25 decision one way or the other.

1 or motivated or aided Tom in driving the way he did under
2 the conditions he was driving. I would submit,
3 Your Honor, that is a small part. It doesn't require, as
4 Mr. Campbell suggested, equal complicity. It does not.
5 It absolutely does not. It only requires that a person
6 aid. That's what the law says, that's what the jury
7 instructions say. That is all it takes. A person has to
8 do something that solicits, encourages, promotes,
9 motivates, or otherwise contributes to the illegal
10 conduct. It doesn't require equal complicity. And if
11 that were the law, Your Honor, - but it doesn't exist, but
12 it would change, dramatically, the fabric of jurisprudence
13 in the state of Washington as well as - who knows where
14 else that might fall into play.
15 There are facts - clearly are facts from which a jury
16 could conclude that the defendant did - I submit a lot of
17 things, but all it takes is one small, itty-bitty thing
18 that helped, motivated, promoted Tom to drive the way he
19 did. With that the standard is met. That's all it takes
20 for the jury to find the defendant guilty also. But
21 clearly, there are facts upon which they could find the
22 defendant guilty because she did things that encouraged,
23 promoted, motivated, enthused Tom, especially when, at the
24 very end - and it's on the tape - he says, "I'm watching
25 to kill us all," or words to that effect. I would submit,

23 (Pages 793 to 796)

City of Auburn v. Hedlund
Trial - Day 4

Page 797

1 Your Honor, that was on the camera being handled by the
2 defendant. What the defendant did with the camera and her
3 own position shows her compliance, her complicity with the
4 crime. Was she as guilty as Tom the driver? I would not
5 suggest that. Or did they promote, encourage, solicit,
6 motivate him to do what he was doing? Absolutely, Your
7 Honor. And that's all it takes. Some facts, some matter,
8 however small.

9 THE COURT: Mr. Heid, let me ask you this
10 question: The statute that the defendant has been charged
11 with, aiding and abetting in the crimes of DUI and
12 reckless driving, is RCW 9A.08.020. And it sets forth
13 what the principals are. And I think we've all gone
14 through those at various times since this case has been
15 filed since last July, but that same statute reads further
16 on, under paragraph five, "Unless otherwise provided by
17 this title or by the law defining the crime, a person is
18 not an accomplice in a crime committed by another person
19 if he is the victim of that crime."

20 The City's case is to show that Mr. Stewart was
21 driving while under the influence of intoxicants and that
22 he was reckless driving or driving recklessly. Upon
23 showing that, then it would be the City's case that
24 Ms. Hedlund aided and abetted in the commission of that
25 crime. How could a jury conclude at the same time that

Page 798

1 she was not a victim of Mr. Stewart's crimes?
2 MR. HEID: Your Honor, was Mr. Stewart a victim
3 of his crime? Obviously, yes, he was. But if
4 Mr. Stewart, who died, is a victim of his own wrongdoing,
5 all that tells us is that people who are doing things
6 wrong can be victims.

7 In this case, Your Honor, the very fact that the
8 defendant got into the car, that precluded, because of its
9 geographic and spacial limitations, the only sober driver
10 to be able to drive, that's all it takes.

11 I would submit, Your Honor, it's like this: At what
12 point - at what point in time would or could the defendant
13 be described as the victim? When the driving was first
14 occurring, when the driving was occurring after Jayme
15 complained about the excessive speed and the staying in
16 your lane of travel? At what point? I would submit,
17 Your Honor, she could not claim any victim status at all
18 until after she'd already committed the crime. She wasn't
19 on the side of the road, happening to be hit by a car over
20 which she had no participation. She was in the car. I
21 would submit, Your Honor, that the definition of victim
22 and the Hanson case that we provided shows that when a
23 person contributes to the injuries that they claim, they
24 cannot - they cannot claim the victim status. That is the
25 case here. The defendant may have been injured, but not

Page 799

1 to the extent that anybody else was, but she may have been
2 injured. But when she was injured, at that point she was
3 already a complicitor in the crimes of drunk diving and
4 reckless driving. She had already encouraged, aided and
5 motivated.

6 And again, the facts are - and I'll submit,
7 Your Honor, that if a person is injured because of
8 something that they did wrong, it makes no difference in
9 terms of their own criminality. If she was guilty, she
10 would have been guilty before the accident. I would
11 submit, Your Honor, nothing happened after the accident.
12 The driver was no longer with us. But if she had done
13 anything wrong, it would have been before the collision
14 occurred. Just as if Mr. Stewart did anything wrong, it
15 would have been before the collision or up to the
16 collision. Because, Your Honor, by that same argument -
17 by defense's argument, Mr. Campbell - Mr. Stewart - Tom
18 Stewart didn't do anything wrong either, because he was a
19 victim too. Because what did he do wrong? He died. He
20 was a victim. That doesn't make any sense. Why does it
21 not make any sense? Because that would require - and this
22 is what the defense is asking you to do - it would require
23 you to ignore everything that happened up until that final
24 point of collision. It would require the Court to ignore
25 everything the defendant did, as well as everything that

Page 800

1 Mr. Stewart did. Because, if she is a victim having - and
2 all it takes is one scintilla of contribution. All it
3 takes is for something, no matter how small, for her to
4 have motivated or promoted or aided or assisted or abetted
5 Tom in doing what he was doing. It didn't happen when she
6 was injured. Nothing happened after that point.

7 If she was a victim, arguably, everybody's a victim.
8 But when does a person become a victim? Do they become a
9 victim when the future is measured or when they are doing
10 the conduct that is before the end of the road? I would
11 submit, Your Honor, she was not a victim when she got into
12 the car. She was not a victim when she picked up the
13 camera. She was not a victim when she lied to her mother,
14 telling her mother that Jayme was going to drive. She was
15 not a victim when she did all of the things that we have
16 alleged, we have put forward, the evidence shows, that
17 would have promoted, motivated, encouraged, even only if a
18 little bit, and all the jury has to find is a little
19 encouragement. They have to believe that that happened,
20 but all it takes is a little encouragement.

21 There is not a threshold that says, in order to be an
22 accomplice you have to have motivated a person to 50
23 degrees or 50 percentage or some measure of what they
24 did. No. Any amount - any appreciable amount of
25 motivation is all it takes. She cannot claim to be a

City of Auburn v. Hedlund
Trial - Day 4

Page 801

1 victim if she has already done something that promoted or
2 motivated. She cannot claim to have done anything after
3 the accident, because nothing was done. Her only status
4 as a victim comes after she has already done what she
5 would have done that would have made her an accomplice.
6 And, Your Honor, there's no getting around that. This is
7 a question that screams for the Court to recognize.
8 If the defendant is a victim, I would submit,
9 Your Honor, that a person who was in a joyride and
10 scratched their finger, getting out of the car, be a
11 victim if they weren't the driver? That's almost as
12 ridiculous as it is. She was not the driver, but she was
13 doing things that promoted the driver to drive the way he
14 was doing, catch him on camera.
15 She was ostensibly or purportedly in control because
16 she says, "Do you want me to drive?"
17 "No, stop the car."
18 Did she stay say "stop"? No. I'd submit,
19 Your Honor, if she had said "stop," perhaps she could have
20 been a victim. Perhaps, if she had done anything,
21 anything at all, to say, "stop what we're doing. I don't
22 want to be where I am." She can't because she wasn't -
23 she was not a victim. She was a participant. And she
24 cannot claim, just like the Hanson case we cited, to have
25 been a victim, because she promoted it, she encouraged

Page 802

1 herself, she put herself in that position.
2 THE COURT: Mr. Heid, does the statute
3 equivocate on what the term "victim" is in --
4 MR. HEID: Yes. Your Honor, look at the Hanson
5 case - the Hanson case. In that case the - the purported
6 victim in that case did things that put herself in the
7 position where she was injured. That, the Court says, is
8 not a victim.
9 But, Your Honor, even if the Court wanted to go that
10 direction, does the statute equivocate? I would submit,
11 can a person commit a crime before they are the victim?
12 Can a person commit a crime before they are the victim?
13 And if they are a victim after the fact, does that absolve
14 them of what they did wrong before they became a victim?
15 And then, again, Your Honor, when did the defendant become
16 a victim? If she became a victim at all, it would have
17 been at the point of collision. Because, unlike Jayme,
18 who said "stop the car," who obviously was not being well
19 pleased with the driving, there was no - nothing like that
20 from the defendant, except "he's being silly."
21 Unlike April, who wasn't able to voice an opinion one
22 way or the other, the defendant had the opportunity to say
23 "slow down, Tom." I would submit, Your Honor, if she had
24 even said that, perhaps the defendant's argument would
25 apply. It does not. Because, if she is a victim, it's

Page 803

1 only after she did whatever she did that would have been
2 criminal. Again, there are no facts before that.
3 THE COURT: Thank you, Mr. Heid.
4 Mr. Campbell?
5 MR. CAMPBELL: Thank you, Your Honor.
6 Mr. Heid's argument to the Court that you can't
7 differentiate Ms. Hedlund's position from Mr. Stewart's
8 position is clearly erroneous. Mr. Stewart's the
9 principal, and Ms. Hedlund sits before the Court as the
10 person that is purportedly an accomplice to Mr. Stewart as
11 the principal driving under the influence and driving in a
12 reckless manner. So to suggest that the two of them stand
13 in the same shoes is wrong and that's why the City has
14 elected to charge Ms. Hedlund based on this accomplice
15 theory of liability.
16 It's the City's own election to have proceeded under
17 9A.08.020. And the City has alleged, even in its own
18 pleadings, acknowledging its responsibility. You can see
19 in the brief that was offered to the Court on Monday
20 morning, the full text of that statute acknowledging the
21 responsibility to have to show that she is not the
22 victim.
23 There is no legal support for the notion that
24 Mr. Heid suggests, which is to focus on a single part of
25 the activity prior to injury occurring. That would be -

Page 804

1 that would derogate all of the types of statutes that we
2 see associated with criminal law designating who a victim
3 is. And so, when you see this quote from State v.
4 Davidson in the City's brief that talks about restitution,
5 well, the restitution statutes are designated specifically
6 for the purpose of making sure that people who are victims
7 of crimes are compensated. This statute is not equivocal
8 in any sense.
9 Mr. Heid suggests that the Hanson case, in some
10 manner, makes the statute equivocal, but it's simply
11 false. As you can see from the heading of the case
12 itself, it's Hanson v. The Department of Labor and
13 Industries, makes reference to a civil cause of action
14 having to do with whether or not a plaintiff can seek
15 damages for injuries incurred, not having to do with
16 whether or not a person, who is accused in a criminal case
17 as an accomplice, is able to seek the status as a victim.
18 The statute's clear on its face. The Court should not
19 seek a tortured construction in order to make the facts
20 apply. This case is clear.
21 All of the witnesses who have testified on behalf of
22 the City have testified that Teresa Hedlund is a victim,
23 and it was the lead investigator's words himself.
24 How the City could come before this Court and suggest
25 that their own officer is wrong in that designation

City of Auburn v. Hedlund
Trial - Day 4

Page 805

1 befuddles me, and I would ask Your Honor to find that
2 Teresa is a victim. I would ask Your Honor to find that
3 Subsection 5 of the applicable statute applies to her, and
4 dismiss these driving offense. Thank you.
5 THE COURT: Washington state legislature, in its
6 infinite wisdom, or some would say lack thereof, has a
7 statute that - I'm not quite sure what they were thinking
8 when they drafted this statute. I've looked at the
9 legislative history, and I can find nothing that would
10 indicate what the thought process was behind excluding a
11 person from being charged with or convicted of aiding and
12 abetting has been a victim of that crime. The statute
13 does not state that they would not be responsible for acts
14 up to the time they became a victim. It just says if they
15 are a victim of that crime, they are not an accomplice to
16 the crime committed by the other person.
17 A victim, as the legislature defines it in the
18 sentencing reformat, under Crime and Punishments, RCW
19 9.94A.03044, quote, "means any person who has sustained
20 emotional, psychological, physical and financial injury to
21 person or property as a direct result of the crime
22 charged," I think being in an automobile and having your
23 car wrapped around a pillar of an abutment as a result of
24 a drunken driver and a reckless driver, and then spending
25 months in a hospital, in rehabilitation, clearly

Page 806

1 constitutes being a victim of a crime. The statute's
2 clear. I cannot see how a jury could possibly conclude
3 that Ms. Hedlund isn't a victim. They can certainly
4 conclude that her behavior leading up to the accident was
5 abhorrent, was inappropriate, and may well have been
6 aiding and abetting, but there's no way they could
7 conclude that she was not also a victim of Mr. Stewart's
8 reckless and drunken driving.
9 I'm going to - the motion of the defendant, the
10 charges of aiding and abetting to reckless driving and
11 aiding and a betting to DUI will be dismissed.
12 MS. MONTGOMERY: Would the Court grant us leave
13 to file an immediate writ? Your Honor, there is nothing
14 under the statute - this is - this is a - basically, a
15 case of first impression of this type. I think that this
16 needs to be reviewed immediately.
17 THE COURT: Mr. Campbell?
18 MR. CAMPBELL: Well, given the Court's ruling,
19 the anticipation of the defense to present the testimony
20 of Mr. Stockinger is no longer required. And prior to
21 coming on the record today, Ms. Montgomery and I discussed
22 the timing for closing arguments in this case, and she and
23 I agreed that what we would hope the Court would do would
24 be to review instructions this afternoon and permit us to
25 come back and present closing arguments to the jury

Page 807

1 tomorrow. I suppose, if the City - if the Court agreed
2 with this timing, and the City presented an appropriate
3 writ in an order to the superior court, then there would
4 be - I could not interpose an appropriate objection.
5 So that timing is what I'm looking for in order to
6 close the case. So if the City proceeds to superior
7 court, I live with what happens in superior court.
8 THE COURT: Ms. Montgomery, I'm not certain that
9 I understand, procedurally, what it is you're proposing to
10 do. Could you explain what you have in mind?
11 MR. HEID: Your Honor, I think the City would
12 request the opportunity to take this decision to the
13 superior court immediately. The City wants to proceed
14 with the matter. The Court has made a decision that,
15 respectfully I submit, discounts or ignores the facts of
16 that case and the point in time when the defendant is the
17 victim. That's nothing that, perhaps, has ever been
18 adjudicated before.
19 THE COURT: It sure hasn't. None of the
20 courtroom research I saw.
21 MR. HEID: I would submit, the Court's heard my
22 arguments --
23 THE COURT: Right.
24 MR. HEID: -- but, Your Honor, the opportunity
25 for the City to address this at all, if at all, is right

Page 808

1 now.
2 THE COURT: That's fine. But I'm not clear if -
3 in essence, what you're asking for is a stay of the trial
4 until --
5 MR. HEID: That's correct, Your Honor.
6 THE COURT: -- and when it can be heard --
7 MR. HEID: What I would do - and I would be glad
8 to work with counsels' calendar, to address this as
9 promptly as possible so as to not allow this to go any
10 longer than absolutely possible. I'll work with - I know
11 you're going to be tied up tomorrow morning, but I would
12 be very willing to work with counsel's calendar to shorten
13 any delays on having this matter reviewed. But,
14 Your Honor, again, if it's to be reviewed at all --
15 THE COURT: Well, how much time are we talking
16 about before the jury would be (inaudible) to hear the
17 remainder of the case?
18 MR. HEID: Your Honor, I would hope that this
19 would be something that - especially if there's
20 cooperation, it could be done as quickly as possible in
21 the superior court, and I'd hope that it wouldn't be more
22 than a day or two.
23 THE COURT: Mr. Campbell?
24 MR. CAMPBELL: I'll cooperate with attempts to
25 get this matter heard in superior court. I think that -

City of Auburn v. Hedlund
Trial - Day 4

Page 809

1 as I'd indicated, I think that the first preliminary
2 matter is, is if Your Honor wanted to push forward, I'd be
3 requesting that we adjourn until tomorrow for closing
4 arguments. If the City gets their papers filed in
5 superior court, and the stay is granted there, I'll live
6 with that. If what I'm hearing is that the City's
7 requesting you to take that action --
8 MR. HEID: No, Your Honor, I'm --
9 THE COURT: No, I don't think - I think what
10 they are asking for is, in essence, a continuance of a
11 forum for a day or two so that they can try to have the
12 matter reviewed before the case proceeds. It does look
13 like we're going to be - I know that the timetable was
14 that we weren't going to be in session tomorrow morning.
15 We do have some matters that need to be resolved. And I'm
16 wondering if we couldn't reconvene the jury, say, Monday
17 afternoon. That should be plenty of time.
18 MR. HEID: Your Honor, I'm going to do the best
19 I can. I will keep in contact - very close contact with
20 Mr. Campbell. He'll probably get tired of me contacting
21 him.
22 THE COURT: All right. Well, then --
23 MS. MONTGOMERY: It will be in recess until
24 Monday afternoon?
25 THE COURT: Do you want to do that or do we want

Page 810

1 to talk about jury instruction?
2 MR. CAMPBELL: I think we need to bring the
3 jurors in and let them know.
4 THE COURT: Yeah, I know. But do we want to
5 talk about jury instructions and closing argument or --
6 MS. MONTGOMERY: Not at this juncture,
7 Your Honor.
8 MR. CAMPBELL: No. I think that we need to -
9 the jury --
10 MS. MONTGOMERY: It's too early.
11 MR. CAMPBELL: -- instructions need to be talked
12 about in reference to the remaining charges.
13 THE COURT: All right. Well, rather than bring
14 them into the courtroom, I think I'll simply just have the
15 bailiff inform them that they need to be back in court
16 Monday afternoon --
17 MS. MONTGOMERY: Thank you, Your Honor. Then we
18 are in recess until Monday afternoon?
19 THE COURT: We are in recess.
20 MS. MONTGOMERY: Thank you.
21 (End of Side 1, Tape 14.)
22 (No Recording on Side 2, Tape 14.)
23
24
25

Page 811

1 CERTIFICATE
2 I, RAE J. THREEDY, a duly authorized Court
3 Reporter and Notary Public in and for the State of
4 Washington, residing at Olympia, do hereby certify:
5 That the foregoing proceedings were tape
6 recorded on January 30, 2003, by the Auburn Municipal
7 Court; that I was not present at the proceedings; that I
8 was requested by counsel to transcribe the tape-recorded
9 proceedings; that the tape recording was transcribed
10 stenographically and reduced to computer-aided
11 transcription.
12 That I am not a relative, employee, attorney or
13 counsel of any party to this action, or relative or
14 employee of any such attorney or counsel, and I am not
15 financially interested in the said action or the outcome
16 thereof;
17 I further certify that the transcript of the
18 tape-recorded proceedings is a full, true, and accurate
19 transcript of all discernible remarks.
20 IN WITNESS WHEREOF, I have hereunto set my hand
21 and affixed my official seal this 30th day of September
22 2003.
23
24
25

Rae J. Threedy, CCR NO. 2542

27 (Pages 809 to 811)

January 30, 2003
Capitol Pacific Reporting, Inc. (360) 352-2054

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1 the Legislature intended the construction that the Defense
2 argues because they included 5(a) and 5(b).

3 Thank you, Your Honor.

4 THE COURT: Thank you.

5 I think had Norm Maleng's office, the county
6 prosecutor, thought it appropriate to bring complicity
7 charges against Ms. Hedlund for the vehicular assault, as
8 it related to her, since she's unfortunately the only one
9 that survived, that crime could not be prosecuted under
10 9A.08.020. The statutory definition of vehicular assault
11 includes basically either reckless driving or DUI driving
12 and then substantial injuries to an individual. So there's
13 a statutory victim that's required pursuant to the
14 definition of the crime. The statute is clear on its face
15 that she could not be prosecuted. I believe it's clear on
16 its face that she could not be prosecuted for that
17 particular crime.

18 Section C of the statute indicates that a
19 person legally accountable for the conduct of another
20 person may be convicted on proof of the commission of the
21 crime and of his complicity therein, though the person
22 claimed to have committed the crime has not been
23 prosecuted, which obviously is the case here, or convicted
24 or has been convicted of a different crime. So had the
25 driver survived, had the driver been convicted of vehicular

1 homicide or vehicular assault as it relates to Ms. Hedlund,
2 the statute contemplates that potentially at least she
3 could still be prosecuted for something else.

4 Then the question becomes was the
5 Legislature clear in defining the particular crime and then
6 the victim exemption from the crime. And they do indicate
7 that a person is not an accomplice in a crime committed by
8 another person if he is a victim of that crime. Miss
9 Hedlund is a victim of vehicular assault. DUI and reckless
10 driving aren't crimes against persons nor are they crimes
11 against property. There's no statutory victim for those
12 crimes other than the State of Washington basically. The
13 Legislature and all of us recognize that the natural,
14 foreseeable probable consequences of many of those cases
15 are accidents, injuries and deaths, but the statutory crime
16 itself does not contain a victim.

17 I think it's clear that when the Legislature
18 says that he is a victim of that crime they are referring
19 to the definition of the crime itself. The definition of
20 neither DUI nor reckless driving contain a victim.
21 Ms. Hedlund is clearly a victim of a crime but not those
22 crimes. And therefore, as a matter of law, that prong of
23 the statute does not apply.

24 Since Judge Burns has ruled that there's
25 sufficient evidence that this matter can proceed to the

1 jury on complicity, but for that section of the statute
2 that I have indicated doesn't apply, the case will be
3 remanded back to municipal court for the trial that is
4 currently in progress on the charges that weren't dismissed
5 as well as now the charges of DUI and reckless driving.

6 I'm not ruling on the sufficiency issue
7 because that wasn't brought up for review. I will sign an
8 order to that effect.

9 MR. HEID: Thank you, Your Honor.

10 THE COURT: Would you take the tape out and
11 make sure that docket gets back to the trial court.

12 MR. HEID: Would the Court be comfortable
13 empowering me to do that as an officer of the court?

14 THE COURT: Either one of you I think is
15 fine.

16 Do you have any problem?

17 MR. CAMPBELL: I have no objection if
18 Mr. Heid gets the materials to the court.

19 MR. HEID: Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. CAMPBELL: Your Honor, Mr. Heid has
22 prepared an order on writ of review which contains certain
23 findings which I don't believe are part of the Court's oral
24 ruling.

25 THE COURT: Let me take a look at it. Do

1 you want me to get copies of it now?

2 MR. HEID: Your Honor, here's the one with
3 my signature on it if the Court would want that.

4 THE COURT: Give Mr. Campbell the other
5 copy.

6 MR. CAMPBELL: I can expedite the objection
7 or indicate the objections here. We're on page two, number
8 four.

9 THE COURT: That's not correct. I will
10 strike that.

11 MR. CAMPBELL: Number five.

12 THE COURT: Five is too broad.

13 MR. CAMPBELL: I don't think number six is a
14 correct statement of how the Court has ruled.

15 MR. HEID: Your Honor, we could --

16 THE COURT: Yes, I didn't -- this is more
17 fact based, mine is more law based. The crime itself
18 doesn't include basically the statutory victim. I mean, my
19 findings --

20 MR. HEID: I agree, Your Honor. I prepared
21 it as best I could in advance.

22 THE COURT: Why don't you both take a few
23 minutes and see if you can reduce what I said to writing.
24 Certainly modify this, and if you can't I'll do it myself.

25 MR. CAMPBELL: Thank you, Your Honor.

1 MR. HEID: Thank you, Your Honor.

2 THE COURT: But I would like the language
3 that I -- she is a victim of vehicular assault but not of
4 DUI and reckless driving.

5 We're in recess.

6

7 (Court recessed.)

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APPENDIX C

Copy of RCW 9A.08.020

RCW 9A.08.020**Liability for conduct of another — Complicity.**

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

(4) A person who is legally incapable of committing a particular crime himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He is a victim of that crime; or

(b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

[1975-'76 2nd ex.s. c 38 § 1; 1975 1st ex.s. c 260 § 9A.08.020.]

Notes:

Effective date -- 1975-'76 2nd ex.s. c 38: "This 1976 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1976." [1975-'76 2nd ex.s. c 38 § 21.]

Severability -- 1975-'76 2nd ex.s. c 38: "If any provision of this 1976 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1975-'76 2nd ex.s. c 38 § 20.]