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Supreme Court No. (to be set)
Court of Appeals No. 47558-8-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Docie Burch
Appellant/Petitioner

Mason County Superior Court Cause No. 14-1-00554-7
The Honorable Judge Amber Finlay

PETITION FOR REVIEW

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Petitioner Docie Burch, the appellant below, asks the Court to review the Court of Appeals published opinion entered on December 28, 2016.[1] This case presents two issues:

1. Is ordinary negligence an essential element of vehicular homicide and vehicular assault when committed by means of intoxicated driving?

2. Did the court's instructions relieve the state of its burden to prove ordinary negligence, an essential element of vehicular homicide and vehicular assault by means of intoxication?

STATEMENT OF THE CASE

While driving over an icy bridge, Docie Burch lost control of her car and hit two people, killing one and injuring the other. RP 32-35, 65, 90, 106-108, 112, 182. The two had stopped to help another car that had gone off the road in the same spot. RP 36, 50, 64-65, 73-74, 89.[2]

Ms. Burch was believed to be intoxicated. She was charged with vehicular homicide and vehicular assault under all three of alternative means of committing each offense. CP 48-49.

At trial, the court instructed jurors that conviction of vehicular homicide required proof that Ms. Burch drove while intoxicated and that her driving "proximately caused injury to another" and that "the injured person died… as a proximate result of the injuries." CP 43. The court also

[1] A copy of the opinion is attached.

[2] Although a gravel truck went past after the first accident, it was not clear how much gravel had been applied. RP 76-86, 186, 228-229, 294-305, 323-332.

instructed jurors that conviction for vehicular assault required proof that she drove while intoxicated and that her driving "proximately caused substantial bodily harm to another." CP 39-40.[3] The court did not instruct the jury that conviction required proof of ordinary negligence or any other culpable mental state. CP 24-47.[4]

The jury convicted Ms. Burch of vehicular homicide and vehicular assault committed by means of intoxicated driving. CP 20-23. She appealed, and the Court of Appeals affirmed in a published decision issued December 28, 2016. Opinion, pp. 1, 22-23. She now seeks review of this decision.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT VEHICULAR HOMICIDE AND VEHICULAR ASSAULT REQUIRE PROOF OF ORDINARY NEGLIGENCE WHEN COMMITTED BY INTOXICATED DRIVING. THE COURT OF APPEALS' PUBLISHED OPINION CONFLICTS WITH *LOVELACE* AND *MCALLISTER*. FURTHERMORE, THIS ISSUE OF STATUTORY INTERPRETATION IS OF SUBSTANTIAL PUBLIC INTEREST AND SHOULD BE DECIDED BY THE SUPREME COURT. RAP 13.4 (B)(2) AND (4).

Strict liability offenses are disfavored. *State v. Bash,* 130 Wn.2d 594, 606, 925 P. 2d 978 (1996). Over the past twenty-five years, the Court

[3] Jurors were also instructed on two other means of committing each offense—reckless driving and driving with disregard for the safety of others. CP 39-40, 43. By special verdict, the jury acquitted Ms. Burch under the reckless driving alternative. CP 20, 21. Jurors could not reach a unanimous verdict on the disregard for safety alternative. CP 20, 21.

[4] The court did define ordinary negligence, in order to distinguish it from recklessness and disregard for the safety of others. CP 37, 42. To this end, the court instructed jurors that "Ordinary negligence in operating a motor vehicle does not render a person guilty." CP 37, 42.

of Appeals has issued conflicting decisions regarding the mental state required for conviction of vehicular homicide and vehicular assault committed by means of intoxicated driving. *See State v. Lovelace*, 77 Wn. App. 916, 919, 895 P.2d 10 (1995) (vehicular assault requires proof of ordinary negligence); *State v. Hursh*, 77 Wn. App. 242, 890 P.2d 1066 (1995)[5] (vehicular assault does not require proof of ordinary negligence); *State v. McAllister*, 60 Wn. App. 654, 659, 806 P.2d 772 (1991)[6] (vehicular homicide requires proof of ordinary negligence). The decision in this case aligns with *Hursh* but conflicts with *Lovelace* and *McAllister.*

The Supreme Court should accept review to determine if the two offenses require proof of ordinary negligence. This will resolve the conflict between these published opinions and will also settle an issue of statutory interpretation that is of substantial public interest and should be decided by the Supreme Court. Accordingly, review is appropriate under RAP 13.4(b)(2), and (4).

A. In the absence of express statutory language, courts use a multi-step process to determine the *mens rea* required for conviction of an offense.

In interpreting any statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011) (*Williams* I). Ordinarily, this is accomplished

[5] *Abrogated on other grounds by State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005).

[6] *Abrogated on other grounds by Roggenkamp, supra.*

by examining a statute's plain language. *Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 840, 383 P.3d 492 (2016).

However, because strict liability offenses are disfavored, a criminal statute's silence on the mental state required for conviction is not dispositive. *Bash,* 130 Wn.2d at 605. Instead, courts engage in a multistep process to determine if the legislature truly intended to create a strict liability offense. *Id.,* at 605-606.

First, where a statute's plain language does not specify a mental element, courts examine legislative history.[7] *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000). Second, if the legislative history proves inconclusive, legislature intent is discerned from examination of eight factors (commonly known as the "*Bash* factors"). *Id.,* at 361-367 (citing *Bash*). These eight factors include

1) The background rules of the common law, and its conventional mens rea element.
2) Whether the crime can be characterized as a "public welfare offense" created by the legislature.
3) The extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct.
4) The harshness of the penalty.
5) The seriousness of the harm to the public.

[7] The Court of Appeals described this step as requiring examination of the "legislative history *and relevant case law*." Opinion, pp. 4, 5-7 (emphasis added) (citing *State v. Wilson*, 170 Wn.2d 682, 687, 244 P.3d 950 (2010)). The *Wilson* case does not deal specifically with the *mens rea* issue; instead, it involves general rules of statutory interpretation. *Id.* In any event, the Court of Appeals found the relevant case law inconclusive. Opinion, pp. 5-7. Presumably, the existence of controlling authority would always allow a court to dispense with the remainder of the analysis.

6) The ease or difficulty with which the defendant can ascertain the true facts underlying the offense.
7) The desirability of relieving the prosecution of difficult and time-consuming proof of fault where the legislature thinks it important to stamp out harmful conduct at all costs, even at the cost of convicting innocent-minded and blameless people.
8) The number of prosecutions to be expected.

Id, at 363. These eight factors are to be analyzed "in light of the principle that offenses with no mental element are generally disfavored." *Id.*

The vehicular homicide and vehicular assault statutes do not specify a mental state required for conviction under the intoxication prong of each offense. RCW 46.61.520(1)(a); RCW 46.61.522(1)(b). Nor does either statute explicitly impose strict liability. RCW 46.61.520(1)(a); RCW 46.61.522(1)(b). There is no controlling precedent issued after the *Bash* decision,[8] and the legislative history is unhelpful. *See* Opinion, pp. 5-7, 15-18.

Therefore, the mental state required for conviction must be determined by examining the *Bash* factors.

B. When committed by means of intoxicated driving, both vehicular homicide and vehicular assault require proof of a culpable mental state.

Six of the eight *Bash* factors suggest that the legislature did not intend to dispense with a *mens rea* requirement in vehicular homicide and vehicular assault cases committed by means of intoxication. The two remaining factors are inconclusive. Each factor is addressed below.

1. The common law and statutory antecedents of vehicular homicide

[8] Prior cases on the issue conflicted, as outlined elsewhere in this Petition.

and vehicular assault required proof of a culpable mental state.

The common law and prior statutory offenses suggest that vehicular assault and vehicular homicide are not strict liability crimes. *See Bash,* 130 Wn.2d at 605-606. There is no direct common law analogue for either offense. The closest common law antecedents are assault and manslaughter, neither of which are founded upon strict liability. *See State v. Sample*, 52 Wn.App. 52, 55, 757 P.2d 539 (1988) (noting that negligent conduct would not constitute assault at common law); *State v. Norman*, 61 Wn.App. 16, 22-23, 808 P.2d 1159, 1162 (1991) (noting that common law manslaughter required more than ordinary negligence). This suggests that the legislature did not intend to impose strict liability.

Although the Court of Appeals examined common law analogues, it erroneously concluded that they did "not significantly illuminate legislative intent." Opinion, p. 8. This is incorrect. Neither the common law antecedents nor the statutory precursors imposed strict liability. When considered "in light of the principle that offenses with no mental element are generally disfavored," this factor suggests that the legislature did not intend to wholly dispense with a culpable mental state for conviction of these offenses.[9] *Anderson*, 141 Wn.2d at 363.

2. Neither offense is a public welfare offense.

[9] Had the legislature intended to do so, it could have explicitly stated its desire to relieve the state of its burden to prove a culpable mental state.

Vehicular homicide and vehicular assault are not public welfare offenses.[10] This suggests that neither statute imposes strict liability. *Anderson*, 141 Wn.2d at 363. The Court of Appeals correctly concluded that this factor favors a mental element for each offense. Opinion, pp. 8-9.

3. Strict liability would punish seemingly innocent conduct.

Imposing strict liability for these offenses "would encompass seemingly entirely innocent conduct." *Bash,* 130 Wn.2d at 606. Absent a mental element, a person who drives perfectly after having consumed alcohol may be liable for vehicular homicide or vehicular assault if involved in an accident that results in injury or death. There are no published opinions exonerating intoxicated drivers involved in accidents despite perfect driving.

The Court of Appeals erroneously concluded that a perfect driver—such as one legally stopped at an intersection—could not be convicted of either offense. Opinion, pp. 10, 19-21. The court suggests that the state must prove "the defendant 'actively participate[d] in the immediate physical impetus of harm.'" Opinion, p. 10 (quoting *State v. Bauer*, 180 Wn.2d 929, 940, 329 P.3d 67 (2014)).

The Court of Appeals misrepresents this language as part of the holding of *Bauer.* In context, the quoted language reads "This court has found no Washington case upholding such liability, either, where the

[10] Public welfare crimes are those which are regulatory in nature, with no direct or immediate injury to person or property. *Id.* Vehicular assault and vehicular homicide cannot be categorized as public welfare offenses: both crimes require harm to persons.

accused did not actively participate in the immediate physical impetus of harm." *Id.*, at 940. The *Bauer* court did not hold that criminal liability can only stem from active participation in the immediate physical impetus of harm.[11]

The Court of Appeals also assumed that a "second driver's actions would be considered a superseding cause of the collision." Opinion, p. 10. In fact, "[a]n intervening cause only breaks the chain of causation if the intervening event is so unexpected that it falls outside the realm of the reasonably foreseeable." *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 418, 150 P.3d 545 (2007). Furthermore, the defendant's conduct can be a proximate cause "if another cause is merely a concurrent cause." *State v. Meekins*, 125 Wn. App. 390, 398, 105 P.3d 420 (2005).[12]

Because strict liability would result in serious felony charges for seemingly innocent conduct, this factor weighs in favor of a *mens rea* requirement for vehicular homicide and vehicular assault. *See, e.g., Anderson*, 141 Wn.2d at 363; *State v. Williams*, 158 Wn.2d 904, 911-914, 148 P.3d 993 (2006) (*Williams* II).

4. The penalty for each offense is extremely harsh.

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[11] Had it done so, the *Bauer* court would have eliminated a large number of criminal offenses and severely limited strict liability crimes.

[12] The Court of Appeals also (apparently) posits that intoxicated drivers cannot, as a matter of law, engage in "seemingly entirely innocent conduct," because they are necessarily guilty of DUI. Opinion, p. 9. But the *Bash* court did not exclude those who may commit a lesser or other related offense from the category of people who are "seemingly entirely innocent." *Bash*, 130 Wn.2d at 606.

The high penalty that attends conviction for vehicular homicide and vehicular assault suggests the legislature did not intend strict liability. *Anderson*, 141 Wn.2d at 364-365. Vehicular homicide is a Class A felony; vehicular assault is a class B felony. RCW 46.61.520(2); RCW 46.61.522(2). The legislature is unlikely to have imposed strict liability for an offense that carries a maximum of ten years in prison (vehicular assault), much less one that could result in a life sentence (vehicular homicide). *See Anderson*, 141 Wn.2d at 365 ("[T]he fact that the offense carries with it a maximum term of five years' imprisonment... is clearly a factor that weighs in favor of a holding that this offense is not one of strict liability"); *Williams* II, 158 Wn.2d at 914 (noting that possibility of five-year penalty "weighs against strict liability.") The Court of Appeals correctly concluded that the "harshness of the penalty weighs plainly against a strict liability interpretation." Opinion, pp. 11, 18.[13]

5. Although both vehicular homicide and vehicular assault by intoxicated driving cause serious public harm, no significant deterrence would be achieved by allowing conviction without proof of ordinary negligence.

The only factor arguably weighing in favor of strict liability is the fifth *Bash* factor. Both vehicular homicide and vehicular assault cause serious harm to the public. But, as in *Bash,* "[w]hether a strict liability

[13] The court's observation that the penalty for vehicular assault "is not as heavy as with vehicular homicide" is irrelevant. Opinion, p. 18. As *Anderson* and *Williams* II show, punishment for even a Class C felony is sufficiently harsh to weigh against strict liability. *Anderson*, 141 Wn.2d at 365; *Williams*, 158 Wn.2d at 914.

standard would accomplish the goal of deterrence is doubtful." *Bash*, 130 Wn.2d at 610.

Strict liability would, at best, increase the deterrent effect of each offense by an immeasurably minute amount. A person who contemplates driving after drinking is unlikely to think about the possibility of conviction for vehicular homicide or vehicular assault.

To the extent such a person thinks about the possibility of injury or death, she or he is most likely to be deterred by the possibility of causing or suffering such harm. An intoxicated person thinking about driving is unlikely to know or care if either offense rests on strict liability or on proof of some culpable mental state.

The Court of Appeals failed to meaningfully consider the magnitude of any deterrent effect. Instead, without examining the improbability of increased deterrence through strict liability, the court erroneously concluded that this factor "weighs plainly in favor of a strict liability interpretation." Opinion, pp. 12, 18-19. Had the court considered the tiny increase in deterrent effect resulting from strict liability, it would not have so confidently concluded that this factor weighs against requiring a culpable mental state.

Instead, although each offense harms the public, this factor is effectively neutral. As in *Bash,* imposing strict liability would have little, if any, deterrent effect. *Id.*

6. The difficulty of ascertaining the "true facts" varies with the individual circumstances of each case.

Under this factor, "'[t]he harder to find out the truth, the more likely the legislature meant to require fault in not knowing.'" *In re Jorge M.*, 23 Cal. 4th 866, 873, 4 P.3d 297, 301, 98 Cal. Rptr. 2d 466 (2000) (quoting 1 LaFave & Scott, Substantive Criminal Law (1986) § 3.8(a), pp. 342–344). This factor is "not particularly useful" when applied to vehicular homicide and vehicular assault by means of intoxicated driving. *See Williams* II, 158 Wn.2d at 915.[14]

This is so because the ease of ascertaining true facts is extremely variable. The characteristics of the driver and the circumstances of the case impact the ease of determining the "true facts."

For example, drivers who are new to alcohol, marijuana, or a lawfully prescribed drug may not fully understand how they will be affected. Changes in weight and body fat composition, or the presence of food in the stomach could alter the "true facts." Someone who consumes a small amount of alcohol or a weak strain of marijuana several hours before driving may have greater difficulty predicting impairment than a person who drinks or smokes a strong intoxicant shortly before getting behind the wheel.[15]

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[14] The *Williams* II court found this factor unhelpful because the "true facts"—the characteristics of unlawful firearms—"may not be obvious, particular to one who is unfamiliar with firearms." *Id.*, at 915.

[15] The Court of Appeals improperly took an unrealistically simplistic approach to this factor, noting that "it is relatively easy for a defendant to ascertain facts surrounding his or her driving under the influence." Opinion, pp. 12-13. This reductive approach oversimplifies the determination of true facts when it comes to drinking and driving.

Because of this variability, this factor is not especially helpful in determining the legislature's intent. As in *Williams* II, it does not contribute to the analysis. *Id.*

7. Requiring proof of ordinary negligence is not overly burdensome in vehicular homicide and vehicular assault cases.

The legislature may be justified in dispensing with proof of fault where proving a culpable mental state will be "difficult and time-consuming." *Bash*, 130 Wn.2d at 610. However, it is neither difficult nor time-consuming to prove ordinary negligence, the *mens rea* urged by Ms. Burch.

Ordinary negligence is the least culpable mental state known to law. It consists of "hundreds of minor oversights and inadvertences." *State v. Ferguson*, 76 Wn.App. 560, 569, 886 P.2d 1164 (1995) (internal quotation marks and citation omitted). Although ordinary negligence is a state of mind, it can be shown through any number of physical acts, such as failing to signal a turn. *See, e.g., Smith v. Fourre*, 71 Wn. App. 304, 309, 858 P.2d 276 (1993); *W. Packing Co., Inc. v. Visser*, 11 Wn. App. 149, 156, 521 P.2d 939 (1974).

Furthermore, the legislature has tasked prosecutors with proving more culpable mental states in identical circumstances, where intoxicants are not involved. *See* RCW 46.61.520(1)(a); RCW 46.61.522(1)(b). The legislature would not regard proof of ordinary negligence as a significant obstacle to prosecution and conviction. Instead, the ordinary negligence standard relieves the state of the heavier burden it carries in cases that do

not involve intoxicated driving. Accordingly, this factor weighs against strict liability.[16] *Anderson*, 141 Wn.2d at 363.

8. There are very few prosecutions for vehicular homicide and vehicular assault committed by means of intoxication.

In general, "the fewer expected prosecutions, the more likely intent is required." *Id.*, at 365. The overall number of prosecutions for vehicular assault and vehicular homicide is low. For FY 2016, there were only 22 vehicular homicides committed by means of intoxicated driving. *See* Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing*, p. 12 (2016).[17] The number of vehicular assaults committed by both intoxicated driving and reckless driving totaled 36. Caseload Forecast Council, p. 12.

These figures represent only 0.2% and 0.4%, respectively, of the total number of felony convictions. Caseload Forecast Council, p. 12. These numbers are far less than the number of convictions for other serious felonies such as, for example, second-degree assault (360) or second-degree burglary (434), both of which require proof of a culpable mental state.[18] Caseload Forecast Council, p. 4. This makes it more likely

[16] The Court of Appeals erroneously failed to give weight to this factor, faulting Ms. Burch for failing to adequately show that ordinary negligence "would be easy to prove in the context of a vehicular homicide or vehicular assault prosecution." Opinion, p. 13.

[17] Available at http://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2016.pdf (accessed January 26, 2017)

[18] *See* RCW 9A.36.021; RCW 9A.52.030.

that the legislature intended conviction to require proof of a culpable mental state. *Id.*, at 365.

9. Summary: The *Bash* factors weigh in favor of requiring a culpable mental state for conviction.

Six of the eight *Bash* factors suggest that the legislature intended to retain a mental element for both vehicular homicide and vehicular assault when committed by means of intoxication. The remaining two are inconclusive.

It is thus unlikely that the legislature "intended to jettison the normal requirement that mens rea be proved." *Anderson*, 141 Wn.2d at 367. Under *Bash*, the statute should be interpreted to require proof of a culpable mental state. *Id.* The omission of any *mens rea* from the court's instructions requires reversal of Ms. Burch's convictions. *Id.*, at 367.

C. Prior cases establish that ordinary negligence is the appropriate mental state for conviction of vehicular homicide and vehicular assault by means of intoxicated driving.

Court decisions preceding *Bash* have required proof of ordinary negligence as an element of vehicular homicide and vehicular assault by means of intoxicated driving. *Lovelace*, 77 Wn. App. at 919 (vehicular assault); *McAllister*, 60 Wn. App. at 659 (vehicular homicide). Neither *Lovelace* nor *McAllister* have been overruled regarding the "ordinary negligence" element.[19]

[19] The *Lovelace* court did not address *Hursh*, which was published just two months before *Lovelace*. In *Hursh*, the Court of Appeals concluded that "RCW 46.61.522 cannot be construed to require a showing of negligent conduct as an element of vehicular assault." *Id.*, at 246.

Nor has the legislature undermined these decisions with subsequent amendments. *See* Laws of 1991, Ch. 348 §1 (amending vehicular homicide statute); Laws of 1996, Ch. 199 §1 (same); Laws of 1998, Ch. 211 §2 (same); *see also* Laws of 1996, Ch. 199 §8 (amending vehicular assault statute); Laws of 2001, Ch. 300 §1 (same).

Furthermore, the ordinary negligence standard makes sense in the overall statutory scheme. Sober drivers may be convicted upon proof of recklessness (RCW 46.61.520(1)(b), .522(1)(a)) or disregard for the safety of others (RCW 46.61.520(1)(c), .522(1)(c)).[20]

Intoxicated drivers, by contrast, may be convicted in the absence of reckless conduct, disregard for the safety of others, or even criminal negligence.[21] Instead, the least blameworthy mental state (ordinary negligence) balances the increased culpability that accompanies the decision to drive after consuming alcohol or drugs.

The trial court failed to instruct jurors on the state's burden to prove any culpable mental state. This requires reversal of Ms. Burch's convictions and remand for a new trial with proper instructions.

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[20] Disregard for safety of others is "an aggravated kind of negligence" requiring "[s]ome evidence of the defendant's conscious disregard" of danger." *State v. Lopez*, 93 Wn. App. 619, 623, 970 P.2d 765 (1999).

[21] *See State v. Beel*, 32 Wn. App. 437, 444-45, 648 P.2d 443 (1982) (distinguishing between ordinary and criminal negligence).

D. The Supreme Court should accept review to resolve a conflict in the Court of Appeals and to settle an issue of statutory interpretation that is of substantial public interest.

The Court of Appeals decision conflicts with *Lovelace* and *McAllister*, both of which also conflict with *Hursh*. The Supreme Court should accept review to resolve this conflict. RAP 13.4(b)(2). In addition, the proper interpretation of RCW 46.61.520(1)(a) and .522(1)(b) is an issue of substantial public interest that should be resolved by the Supreme Court. RAP 13.4(b)(4).

II. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE BECAUSE THE TRIAL COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE ORDINARY NEGLIGENCE. THIS SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW IS OF SUBSTANTIAL PUBLIC INTEREST AND SHOULD BE DECIDED BY THE SUPREME COURT. RAP 13.4(B)(3) AND (4).

A. The trial court's failure to include ordinary negligence in its elements instruction requires reversal of Ms. Burch's convictions.

A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the court's elements instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith,* 131 Wn.2d 258, 263, 930 P.2d 917 (1997). This is so even if other instructions supply the missing element. *Id; Lorenz,* 152 Wn.2d 22 at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Here, the court's "to convict" instructions did not require proof of ordinary negligence to establish the DUI alternative of each offense. CP

39, 43. This omission requires reversal of Ms. Burch's convictions. *Smith,* 131 Wn.2d at 263.

B. The instructions as a whole did not make the ordinary negligence standard manifestly clear to the average juror.

Due process prohibits a trial judge from instructing jurors in a manner that relieves the state of its burden of proof. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). Furthermore, jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). If a jury can construe a court's instructions to allow conviction without proof of an element, any resulting conviction violates due process. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

The court did not instruct jurors that the state was required to prove ordinary negligence to obtain a conviction under the intoxicated driving alternative. Instead, the court included a definition of "ordinary negligence" in its instructions, but only to distinguish ordinary negligence from recklessness and from disregard for the safety of others (under those alternative means of committing each crime). CP 37, 42.

Far from clarifying the state's burden to prove ordinary negligence, the instruction gave the opposite impression. The court specifically told jurors "[o]rdinary negligence in operating a motor vehicle does not render a person guilty of vehicular [assault/homicide]." CP 37, 42. The court did

not limit this instruction to the recklessness or disregard for safety alternative means. CP 37, 42.

Nor was this misstatement corrected elsewhere in the court's instructions. CP 24 – 47. Instead of making the relevant standard manifestly clear, the instructions relieved the state of its burden to prove ordinary negligence as part of the DUI means of committing each offense.

C. The errors prejudiced Ms. Burch and require reversal.

Constitutional error is presumed prejudicial, and the state must show harmlessness beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). The prosecution cannot show harmlessness in this case.

The jury acquitted Ms. Burch under the reckless alternative means for each charge, and jurors could not agree that she'd driven with disregard for the safety of others. CP 20, 21. Furthermore, accidents occurred frequently at the location where Ms. Burch lost control of her truck, and another driver's vehicle had left the road that very morning. RP 47, 55-56.

Conviction under the DUI prong turned on whether or not Ms. Burch drove with adequate care. The evidence on this point was conflicting. Accordingly, the state cannot show harmlessness beyond a reasonable doubt. *Id.*

Ms. Burch's convictions must be reversed and the case remanded. *Id.* On retrial, the court must instruct jurors that conviction of vehicular

assault and vehicular homicide by means of intoxicated driving requires proof of ordinary negligence.

D. The Supreme Court should accept review.

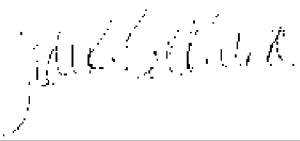
The trial court failed to instruct jurors on the state's obligation to prove ordinary negligence. This violated Ms. Burch's Fourteenth Amendment right to due process. The Supreme Court should accept review, because this significant issue of constitutional law is of substantial public interest. RAP 13.4(b)(3) and (4).

CONCLUSION

The Supreme Court should accept review, reverse the convictions, and remand the case for a new trial with proper instructions.

Respectfully submitted January 27, 2017.

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Docie Burch, DOC #382543
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

and I sent an electronic copy to

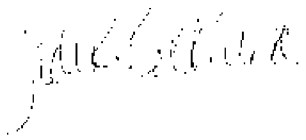
timw@co.mason.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 27, 2017.



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APPENDIX:

Court of Appeals Published Opinion, entered December 28, 2016

Filed
Washington State
Court of Appeals
Division Two

December 28, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DOCIE E. BURCH, Appellant.	No. 47558-8-II PUBLISHED OPINION

BJORGEN, C.J. — Docie Burch appeals her convictions for vehicular homicide and vehicular assault stemming from a drunk driving accident. She argues that the trial court erred by giving the jury to-convict instructions for both crimes that allowed the jury to find her guilty without finding that the State proved ordinary negligence. We hold that to convict a defendant of vehicular homicide or vehicular assault, the State need not prove that a driver acted with ordinary negligence in the operation of a motor vehicle if it proves that the driver was under the influence of alcohol or drugs while driving that vehicle, along with other elements of the offense. Therefore, the trial court did not err by omitting a negligence element from its instructions to the jury. Accordingly, we affirm Burch's convictions.

FACTS

In December 2014, Burch was driving across an icy bridge when her truck spun out, slid off the road, and hit two men who were investigating the scene of an earlier accident. One of the men died and the other received serious injuries, including multiple broken bones and a severe ear laceration.

Burch was uncooperative with law enforcement officers who responded to the scene. During their contact with Burch, the officers noticed that she smelled strongly of intoxicants.

They restrained Burch and brought her to a hospital to draw blood to test for intoxicants. Testing of that sample showed a blood alcohol concentration of .09, indicating a concentration between .11 and .14 two hours after the accident.

The State charged Burch with vehicular homicide and vehicular assault, alleging that she drove or operated a motor vehicle while under the influence of intoxicating liquor or any drug or any combination of the two, in a reckless manner, and with disregard for the safety of others. Following trial, the court gave the jury the State's proposed to-convict instructions, which specified that it could reach a guilty verdict as to vehicular homicide only if it found

> (1) That . . . the defendant drove a motor vehicle;
> (2) That the defendant's driving of the motor vehicle proximately caused injury to another person;
> (3) That at the time of causing the injury, the defendant was driving the motor vehicle
> (a) while under the influence of intoxicating liquor or drugs; or
> (b) in a reckless manner; or
> (c) with disregard for the safety of others;
> (4) That the injured person died within three years as a proximate result of the injuries; and
> (5) That the defendant's act occurred in the State of Washington.

Clerk's Papers (CP) at 43. Similarly, the to-convict instruction for vehicular assault informed the jury it could reach a guilty verdict only if it found

> 1. That . . .the defendant drove a vehicle;
> 2. That the defendant's driving proximately caused substantial bodily harm to another person;
> 3. That at the time the defendant
> a. drove the vehicle in a reckless manner; or
> b. was under the influence of intoxicating liquor or drugs; or
> c. drove the vehicle with a disregard for the safety of others; and
> 4. That this act occurred in the State of Washington.

CP at 39.

In other instructions, the trial court clarified the standards for the mental states of recklessness and disregard for the safety of others. However, no instruction mentioned any

further mental element that would be required to find Burch guilty because she was under the influence of intoxicating liquor or drugs. Burch did not object to any of the instructions and did not propose alternative instructions.

The jury found Burch guilty of both vehicular homicide and vehicular assault. In special verdicts, the jury found that Burch had driven while under the influence of intoxicating liquor or drugs, but had not driven recklessly. CP at 20-21. The jury was unable to agree as to whether she had driven with disregard for the safety of others. *Id.*

Burch appeals her convictions.

ANALYSIS

The fundamental question presented by this appeal is whether the crimes of vehicular homicide and vehicular assault committed while under the influence of alcohol or drugs require the State to prove ordinary negligence in addition to the fact that the defendant was under the influence of alcohol or drugs. Burch separately challenges her convictions for vehicular homicide and vehicular assault on the grounds that the to-convict jury instructions omitted the negligence element. The State implicitly contends that both vehicular homicide and vehicular assault are strict liability offenses, arguing that no showing of negligence is required for either crime in light of legislative amendments and subsequent case law.

I. STANDARD OF REVIEW

In a criminal case, the State bears the burden of proving each element of a charged crime beyond a reasonable doubt. *State v. Fisher*, 165 Wn.2d 727, 753, 202 P.3d 937 (2009). In recognition of this requirement, the trial court's to-convict jury instruction generally must contain all elements of the crime essential to the conviction. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Whether the elements of a particular statutory crime include a mens rea

element is a matter for the legislature to decide. *State v. Bash*, 130 Wn.2d 594, 604, 925 P.2d 978 (1996). Thus, we must interpret relevant statutes to ascertain whether the legislature intended to include such an element. *Id.* at 604-05. We conduct this inquiry de novo. *State v. Wilson*, 170 Wn.2d 682, 687, 244 P.3d 950 (2010); *Mills*, 154 Wn.2d at 7.

Our interpretive analysis first examines the statute's language to determine whether it expresses any mens rea requirement. *State v. Barnes*, 153 Wn.2d 378, 384, 103 P.3d 1219 (2005). If it is silent as to such a requirement, we consider the legislative history of the statute and relevant case law. *Id.*; *Wilson*, 170 Wn.2d at 687. Where resort to legislative history and case law proves inconclusive, we consider the eight factors outlined in *Bash*, which weigh upon legislative intent. *State v. Anderson*, 141 Wn.2d 357, 363, 5 P.3d 1247 (2000).

II. VEHICULAR HOMICIDE

Burch argues that ordinary negligence is an element of vehicular homicide by driving under the influence of alcohol or drugs. We disagree.

A. Statutory Language

The vehicular homicide statute, RCW 46.61.520, provides in relevant part:

> (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; or
> (c) With disregard for the safety of others.

The plain language of subsection (1)(a) is silent as to ordinary negligence or any other mens rea requirement. However, the other two subsections express clear requirements of driving in a reckless manner or with disregard for the safety of others.

The general maxim of statutory construction, expressio unius exclusio alterius est, provides some assistance in determining legislative intent. According to that maxim,

> "[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature."

State v. Swanson, 116 Wn. App. 67, 75, 65 P.3d 343 (2003) (quoting *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)). Applying expressio unius to RCW 46.61.520, we may infer the legislature's intent to impose strict liability in subsection (1)(a) from its decision to express mens rea requirements in subsections (1)(b) and (1)(c) but not in subsection (1)(a). However, because subsection (1)(a) is silent on its face as to mens rea, we look to the legislative history and relevant case law for further guidance.

B. Legislative History and Case Law

The current statutory language set out above was enacted by amendment in 1991. LAWS OF 1991, ch. 348, § 1. Before the 1991 amendment, the statute read in relevant part:

> 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 while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502 . . . the person so operating such vehicle is guilty of vehicular homicide.

Former RCW 46.61.520 (1983). This language is substantively identical to the current language, though organized differently. The available legislative reports are silent as to the purpose of the reorganization. *See, e.g.*, HB REP. ON S.H.B. 1886, 52nd Leg., Reg. Sess., at 1-2 (Wash. 1991) (discussing only the sentencing-related portions of the amending act).

In *State v. MacMaster*, our Supreme Court adopted a reading of the earlier statute that required the State to prove that impairment due to alcohol was a proximate cause of the victim's death. 113 Wn.2d 226, 231, 778 P.2d 1037 (1989). The court's reasoning was that even though

the plain language of the statute did not expressly provide for such a requirement, it was necessary to avoid imposing strict liability. *Id.*

In two later opinions, other divisions of our court noted that to convict a defendant of vehicular homicide, the State must prove he acted with ordinary negligence in addition to proving he was under the influence of intoxicants. These opinions, *State v. Miller*, 60 Wn. App. 767, 772, 807 P.2d 893 (1991), and *State v. McAllister*, 60 Wn. App. 654, 658-59, 806 P.2d 772 (1991), relied on *State v. Fateley*, 18 Wn. App. 99, 566 P.2d 959 (1977), a case interpreting an even earlier version of RCW 46.61.520 defining the antecedent crime of negligent homicide. *Fateley*, in their view, established that ordinary negligence was a requirement in addition to operation of a vehicle under the influence. Yet the court in *Fateley* had merely explained that "more than ordinary negligence must be shown to support a conviction for negligent homicide," and operation of a vehicle under the influence proximately causing the victim's death was one such sufficient showing. 18 Wn. App. at 103-04. In fact, *Fateley* seemed to view operation of a vehicle under the influence simply as probative of driving in a reckless manner and with disregard for the safety of others, which were then and are now alternative grounds for conviction based on mental culpability greater than ordinary negligence. *Id.* at 103 n.5; *see also State v. Eike*, 72 Wn.2d 760, 764-65, 435 P.2d 680 (1967).

Following the 1991 amendment to RCW 46.61.520, our Supreme Court revisited the *MacMaster* proximate cause issue in *State v. Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995). It noted that the court in *MacMaster* had "provided no support nor analysis for its conclusion that a strict liability result must be avoided." *Id.* at 450. It further noted that despite the *MacMaster* reasoning, the legislature did not add an express requirement that the State prove a proximate causal link between the driver's intoxication and the death. *Id.* at 451. Instead, "[t]he

Legislature did state . . . as clearly as possible, that the only causal connection which the State is required to prove is the connection between the act of driving and the accident." *Id.* Reassessing the elements in light of the amended language, it held that "RCW 46.61.520, as amended in 1991, does not require proof of a causal connection between intoxication and death." *Id.* at 453.

The State argues that *Rivas* effectively controls our analysis. However, the court in *Rivas* did not hold that vehicular homicide is a strict liability crime. *See* 126 Wn.2d at 453 ("[E]ven if RCW 46.61.520, as amended in 1991, sets forth a strict liability crime, no authority has been cited indicating that strict liability is impermissible."). *Rivas* clearly disapproved of *MacMaster*'s attempt to avoid a strict liability reading by grafting a nonstatutory requirement that the driver's intoxication proximately cause the victim's death. *Id.* at 451-52. It also noted that other states impose strict liability for analogous offenses. *Id.* at 452-53. Yet it stopped short of declaring that our legislature intended to follow suit. More importantly, it neither approved nor rejected the ordinary negligence element recognized by *McAllister* and *Miller*. Therefore, it cannot be said that *Rivas* is dispositive here. We must examine the *Bash* factors to determine whether the legislature intended vehicular homicide to be a strict liability offense.

C. *Bash* Factors

When considering whether a statute silent as to mens rea defines a strict liability offense, we look to the eight *Bash* factors: (1) whether there is an antecedent or analogous common law offense and its mens rea element; (2) whether the crime can be characterized as a "public welfare offense"; (3) the extent to which a strict liability reading of the statute would encompass seemingly innocent conduct; (4) the harshness of the penalty imposed for the offense; (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the

true facts; (7) whether a mens rea requirement would make proof of fault overly difficult and time consuming; and (8) the number of prosecutions to be expected. *Bash*, 130 Wn.2d at 605-06.

1. Common Law Antecedent

Vehicular homicide has no direct ancestry in the common law. *Rivas*, 126 Wn.2d at 446-47. Where a statutory crime "has no common law antecedent, the conventional mens rea element cannot directly control." *State v. Warfield*, 119 Wn. App. 871, 880, 80 P.3d 625 (2003). The closest analog to vehicular homicide at common law was manslaughter. *Rivas*, 126 Wn.2d at 446. That crime required proof of gross negligence. *State v. Williams*, 4 Wn. App. 908, 912, 484 P.2d 1167 (1971). However, the legislature created the crime of negligent homicide, the statutory antecedent to vehicular negligent homicide, to allow for convictions where manslaughter could not be proved. *State v. Costello*, 59 Wn.2d 325, 334, 367 P.2d 816 (1962) (Foster, J., concurring specially, with majority support). Thus, this factor does not significantly illuminate legislative intent in enacting the 1991 amendments to RCW 46.61.520.

2. Classification as a Public Welfare Offense

Public welfare offenses are likely to be strict liability offenses. *See Bash*, 130 Wn.2d at 606-07. These offenses are malum prohibitum crimes, typically regulatory in nature, of which the victim is society at large:

> While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.

Morissette v. United States, 342 U.S. 246, 256, 72 S. Ct. 240, 96 L. Ed. 288 (1952). Many public welfare offenses result in "'no direct or immediate injury to person or property but merely

create the danger or probability of it which the law seeks to minimize.'" *Bash*, 130 Wn.2d at 607 (quoting *Morissette*, 342 U.S. at 255-56).

The offense of vehicular homicide shares characteristics on each side of this divide. It impairs controls deemed essential to the social order and visits an injury no matter what the intent of the violator. On the other hand, the offense has a clear victim, the deceased, and could be deemed more malum in se, given modern sensibilities. Thus, this factor weighs in favor of neither position.

3. Encompassing of Seemingly Innocent Conduct

Offenses that criminalize a broad range of apparently innocent behavior are less likely to be strict liability offenses. *Bash*, 130 Wn.2d at 608. However, vehicular homicide committed by a driver under the influence encompasses little, if any, seemingly innocent conduct.

Driving under the influence of alcohol or drugs is itself a serious criminal offense. RCW 46.61.502(1). Therefore, operating a motor vehicle under the influence is rarely, if ever, innocent behavior.[1] Because vehicular homicide while under the influence of intoxicating liquor or drugs requires the State to prove the facts of both impairment and operation of a motor vehicle, the crime necessarily encompasses primarily or solely criminal behavior.

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[1] It remains an open question whether driving under the influence, as defined in RCW 46.61.502, is itself a strict liability offense. *See State v. Dailey*, 174 Wn. App. 810, 815, 300 P.3d 834 (2013). Interpreting an older intoxicated driving statute, former RCW 46.56.010 (1964), our Supreme Court held that a person was not guilty of the crime without knowledge that an ingested substance could produce intoxication. *Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 466, 401 P.2d 350 (1965). Our appellate courts have yet to decide whether the successor crime requires the State to prove the defendant was negligent. *See Dailey*, 174 Wn. App. at 815; *see also State v. Rich*, 184 Wn.2d 897, 905, 365 P.3d 746 (2016) (noting that RCW 46.61.502 contains no recklessness element). Regardless, knowledge of the intoxicating properties of the most common intoxicants—alcohol and marijuana—is nearly universal, so with or without the *Kaiser* requirement, driving under the influence of those substances will almost never be innocent behavior.

Some seemingly innocent conduct could be encompassed by a strict liability interpretation of RCW 46.61.520(1)(a) if there were no proximate cause requirement. For example, a driver who is under the influence of drugs or alcohol carrying a passenger in his vehicle could be safely stopped at a traffic light when a second driver collides with the first driver's vehicle, killing the first driver's passenger. The first driver in this scenario is likely less culpable than the second, yet if a driver's impairment and operation of a motor vehicle were the only elements of RCW 46.61.520(1)(a), the first driver would be guilty of vehicular homicide. However, RCW 46.61.520(1)(a) specifically requires that the victim's death be the "proximate result of injury proximately caused by the [driver]." We have held that this requirement incorporates the common law principles of proximate causation as judicially defined in Washington. *State v. David*, 134 Wn. App. 470, 481-82, 141 P.3d 646 (2006).

According to these longstanding principles, proximate cause has two components: (1) cause-in-fact, or actual cause and (2) legal cause. *State v. Bauer*, 180 Wn.2d 929, 935 n.5, 329 P.3d 67 (2014). Our Supreme Court also has held that "'legal cause' in criminal cases differs from, and is narrower than, 'legal cause' in tort cases in Washington." *Id.* at 940. In criminal cases, proximate cause requires a showing that the defendant "actively participate[d] in the immediate physical impetus of harm." *Id.*

Application of these principles ensures that even a strict liability understanding of vehicular homicide does not encompass a significant volume of innocent conduct. In our hypothetical example, the first driver's driving under the influence likely would not be considered a proximate cause of the passenger's death because the second driver's actions would be considered a superseding cause of the collision. A superseding cause is "a new, independent act [that] breaks the chain of causation." *Riojas v. Grant County Pub. Util. Dist.*, 117 Wn. App.

694, 697, 72 P.3d 1093 (2003). Only intervening acts that are not reasonably foreseeable qualify as such superseding events. *State v. Roggenkamp*, 115 Wn. App. 927, 945, 64 P.3d 92 (2003), *aff'd*, 153 Wn.2d 614, 106 P.3d 196 (2005). Therefore, the driver under the influence in our example would be guilty of vehicular homicide only where the intervening act was reasonably foreseeable.

Given the clear proximate cause requirement of RCW 46.61.520(1)(a), little seemingly innocent conduct would be prohibited by a strict liability interpretation of RCW 46.61.520(1)(a). Therefore, this factor weighs toward such an interpretation.

4. Harshness of the Penalty Imposed

Where severe punishment is imposed, the legislature more likely intended to require some finding of fault. *Bash*, 130 Wn.2d at 609. Vehicular homicide is a class A felony,[2] RCW 46.61.520(2), with a seriousness level of 11, RCW 9.94A.515. Depending on a defendant's offender score, the crime is punishable by imprisonment from 78 to 280 months. RCW 9.94A.510. Further, 24 months are added to a defendant's sentence for each prior conviction for driving or physically controlling a vehicle under the influence of alcohol or drugs. RCW 46.61.520(2); RCW 46.61.5055. The penalties imposed for vehicular homicide can result in years, and potentially decades, of prison time. The harshness of the penalty weighs plainly against a strict liability interpretation.

[2] The legislature elevated the offense from a class B to class A felony in 1996, after our Supreme Court decided *Rivas*, without making other alterations. E.S.H.B. 2227, 54th Leg., Reg. Sess. (Mar. 28, 1996).

5. Potential for Harm to the Public

Where the potential harm to the public is great, the legislature more likely intended to impose strict liability. *Bash*, 130 Wn.2d at 609-10. Vehicular homicide poses a very serious risk of harm to the public. Our Supreme Court discussed this potential for harm in *Bash*, noting that

> [c]ourts have recognized that alcohol is an inherently dangerous substance producing harmful secondary effects such as drunk driving, and accordingly alcohol-related offenses may be strict liability offenses. Moreover, the conduct in vehicular homicide by intoxication requires the choice to consume alcohol and drive, an unquestionably dangerous combination.

130 Wn.2d at 611 (internal citation omitted). This risk stands in contrast to the dog-attack statute at issue in *Bash*, which the court noted was unlikely to effectively deter dog attacks if owners were unaware that their dogs were dangerous. *Id.* at 610-11.

With crimes that require voluntary impairment and operation of a motor vehicle, the deterrent effect is arguably *stronger* when no mens rea is required. As Justice Durham noted in her *MacMaster* concurrence, intoxicated driving has historically been illegal per se in Washington regardless of actual impairment, because the legislature considered "dangerous drunk driving as a problem of a severity that only clear-cut preventatives, overbroad though they may be, are capable of addressing." 113 Wn.2d at 237 (Durham, J., concurring). Among the driving under the influence offenses, it cannot be denied that vehicular homicide involves the greatest possible harm. This factor weighs plainly in favor of a strict liability interpretation.

6. Difficulty of Ascertaining the Facts

Where it is difficult for a defendant to ascertain the true facts relevant to commission of the crime at issue, the legislature more likely intended to impose some mens rea element. *Bash*, 130 Wn.2d at 605-06, 610. However, it is relatively easy for a defendant to ascertain facts surrounding his or her driving under the influence. At least where the defendant's conduct is

voluntary, the fact of intoxication—or at least the consumption of intoxicating substances—will usually be known to the defendant prior to operating a vehicle. Even in situations involving, for example, pharmaceutical medicines not commonly known to have intoxicating effects, information regarding the potential for impairment and warnings regarding operation of motor vehicles and heavy machinery are readily available and often among the labels on the packaging. This factor weighs toward a strict liability interpretation.

7. Difficulty of Proving Fault and Number of Prosecutions Expected

As to the last two factors, little can be said on the record before us.[3] As in *Bash*,

> [t]he record does not offer any information regarding the difficulty for the prosecution in proving fault nor does it offer whether the burden would be so time-consuming that imposing strict liability would be justified. Likewise, the record is silent as to the number of prosecutions which can be expected under the [the statute].

130 Wn.2d at 610. It appears that neither of these remaining factors weighs significantly in either direction, but we can say little on the matter without going beyond the record.

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[3] Burch presents a very limited argument that proof of fault would not be overly difficult because ordinary negligence encompasses a variety of behaviors. However, she points to nothing in the record or our case law showing that these behaviors would be easy to prove in the context of a vehicular homicide or vehicular assault prosecution.

Regarding the number of prosecutions, she directs our attention outside of the record to the Caseload Forecast Council's 2014 report on adult felony sentencing, which she argues shows the number of prosecutions to be "relatively low." Reply Br. of Appellant at 4. Even if we were to consider the report, the data contained therein do not show levels of prosecution low or high enough to be significantly probative of legislative intent. According to those data, in 2014 in Washington 22 people were sentenced that year for vehicular homicide due to driving under the influence and 29 were sentenced for vehicular assault due to driving under the influence or reckless driving. Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing, Fiscal Year 2014*, at 12 (March 2015). These numbers are roughly in the middle of those for all crimes included in the report. The numbers rose to 28 sentences for vehicular homicide while under the influence and 44 sentences for vehicular assault while under the influence or driving recklessly in the 2015 report, a notable increase but still effectively immaterial for purposes of a *Bash* analysis. Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing, Fiscal Year 2015,* at 12 (January 2016).

8. Conclusion

Balancing the *Bash* factors is difficult where, as here, they point in different directions. The severity of the punishment imposed for violation of RCW 46.61.520(1)(a) indicates that the legislature likely intended to impose strict liability only if the potential risk of harm was great and the likelihood of punishing innocent conduct was low. Because driving under the influence presents a serious risk of death to the people of Washington, and the statute's proximate cause requirement greatly limits application to any seemingly innocent conduct, we hold that analysis of the *Bash* factors indicates that the legislature intended to impose strict liability for vehicular homicide while under the influence of alcohol or drugs.

These considerations, along with the analysis of relevant statutory language above, lead to a single conclusion: the trial court did not err by instructing the jury that it could convict Burch without finding ordinary negligence or any other culpable mental state.

III. VEHICULAR ASSAULT

Burch argues that ordinary negligence is also an element of vehicular assault by driving under the influence of alcohol or drugs. We disagree.

A. Statutory Language

The vehicular assault statute, RCW 46.61.522, provides in relevant part:

> (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
> . . . .
> (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another.

The plain language of subsection (1)(b) does not mention any mens rea requirement. However, as with the vehicular homicide statute, the other two subsections of RCW 46.61.522(1) express mens rea requirements: recklessness and disregard for the safety of others.

We may infer by application of expressio unius that the legislature intended to impose no mens rea requirement under subsection (1)(b). However, we again turn to the legislative history and relevant case law for further guidance.

B. Legislative History and Case Law

The current language of RCW 46.61.522 was enacted by amendment in 2001. When considering the 2001 amendments, the legislature specifically distinguished vehicular assault from negligent driving in the first degree. HB REP., S.B. 5790, 57th Leg., Reg. Sess., at 2 (2001). It noted that the latter offense requires that the driver "operat[e] a vehicle in a manner that is negligent and endangers a person or property" and "exhibit the effects of having consumed alcohol or drugs." *Id.* This shows that the legislature understood how to define an offense that required both negligence and intoxication. Yet it included no negligence requirement in RCW 46.61.522(1)(b). However, the legislature did not expressly state that it intended vehicular homicide to be a strict liability offense.

The prior language of RCW 46.61.522 provided:

> (1) A person is guilty of vehicular assault if he operates or drives any vehicle:
> . . . .
> (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and this conduct is the proximate cause of serious bodily injury to another.

The substantive differences between this earlier language and the current language are that proximate causation was required under the older statute but only causation is required under the current one, and "serious bodily injury" to the victim was formerly required while now "substantial bodily harm" is required. The following passage from the legislative reports supports the legislative intent to make these changes:

> The causation element of vehicular assault is changed from proximate cause to actual cause, and the requirement that recklessness or driving under the influence

> is the cause of the injury is removed. In addition, the degree of injury that is required for vehicular assault is lowered from "serious bodily injury" to "substantial bodily harm."

HB REP., S.B. 5790, 57th Leg., Reg. Sess., at 2 (2001). However, the House Bill Report also states that "[t]he change to the causation prong brings the vehicular assault statute in line with the vehicular homicide statute," which does require a showing of proximate cause. HB REP., S.B. 5790, 57th Leg., Reg. Sess., at 3 (2001), RCW 46.61.520.

Interpreting the former statutory language, Division One of our court held in *State v. Hursh*, 77 Wn. App. 242, 246-47, 890 P.2d 1066 (1995),

> that RCW 46.61.522 cannot be construed to require a showing of negligent conduct as an element of vehicular assault. To attempt such a construction would be to read into the statute an element which is not there.

The court accordingly approved a to-convict instruction that did not require the jury to find that the defendant acted with ordinary negligence.

However, *State v. Lovelace*, 77 Wn. App. 916, 919, 895 P.2d 10 (1995) reached a different conclusion, holding that "[t]o establish *proximate cause* in a vehicular assault case, the State must prove ordinary negligence and intoxication while driving." (Emphasis added.) It cited *McAllister*, which similarly held: "What must be shown to support a conviction under the first alternative [the driver's intoxication] as the proximate cause is a combination of ordinary negligence and intoxication while driving." 60 Wn. App. at 658-59 (footnotes omitted).

By changing the causation element in 2001 from one expressly requiring proximate cause to one merely requiring "cause[]," the legislature arguably indicated its disapproval of the holding in *Lovelace*. Moreover, our Supreme Court's decision in *Rivas* called into question the case law on which the *Hursh* court relied in reaching its result. However, it remains unclear whether *Lovelace* was fully superseded by the 2001 amendments.

Following those amendments, only one appellate court division appears to have considered whether ordinary negligence is an element of vehicular assault. Addressing the question of whether first degree negligent driving is a lesser included offense of vehicular assault, Division Three of our court stated without citation that

> [t]o commit vehicular assault, a driver must: drive recklessly and cause serious bodily injury or drive intoxicated and cause serious bodily injury. . . . First degree negligent driving is not a lesser-included offense of the second alternative means of committing vehicular assault because under that alternative there is no requirement of negligent driving.

State v. Bosio, 107 Wn. App. 462, 465-66, 27 P.3d 636 (2001). The court apparently interpreted RCW 46.61.522 according to its plain language alone, as it does not address *Lovelace*, *Hursh*, or any of the vehicular homicide cases. Nor does the decision address the *Bash* factors.

Finally, we note that our Supreme Court in *State v. Pappas*, 176 Wn.2d 188, 194, 289 P.3d 634 (2012), observed that "[i]n 2001, the vehicular assault statute was amended to eliminate the proximate cause requirement." The issue in *Pappas* was whether the Sentencing Reform Act, chapter 9.94A RCW, authorized an exceptional sentence for vehicular assault when the jury found that the victim's injuries substantially exceed "substantial bodily harm," which is the current level of harm required to convict. *Id.* at 193-94. In distinguishing two prior decisions, the court stated:

> Both *Nordby* and *Cardenas* were decided under the pre-2001 version of the vehicular assault statute that required a higher level of harm, i.e., that the defendant proximately caused "serious bodily injury" while acting in a reckless manner or under the influence of alcohol or drugs. Former RCW 46.61.522 (1996). . . . In 2001, the vehicular assault statute was amended to eliminate the proximate cause requirement, to include an additional means of committing vehicular assault by showing "disregard for the safety of others," and to lower the harm requirement from "serious bodily injury" to "substantial bodily harm." RCW 46.61.522 (amended 2001).

Pappas, 176 Wn.2d at 193-94.

This analysis focuses on the lowering of the harm level, which pertains to the basis for an exceptional sentence under RCW 9.94A.535(3)(y). The type of causation played no role in the *Pappas* court's analysis, but rather was part of the background description of the remaining features of the 2001 legislation. A statement is dicta when it is not necessary to the court's decision in a case. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914 (2013). Dicta is not binding authority. *Id.* Therefore, *Pappas* is not controlling on the nature of the causation required for vehicular assault.

The terms of the statute, its legislative history, and case law interpreting it do not lift ambiguity's fog from this issue. Therefore, we turn to the *Bash* factors to determine whether negligence is an element of vehicular assault.

C. *Bash* Factors

Analysis of most of the *Bash* factors for vehicular assault is the same as that outlined in Section I(C) supra for vehicular homicide. Those that differ are discussed below.

1. Harshness of the Penalty Imposed

The penalty imposed for vehicular assault is less harsh than that imposed for vehicular homicide. Vehicular assault is a class B felony, RCW 46.61.522(2), with a seriousness level of four, RCW 9.94A.515. As such, it is punishable by 3 to 84 months in prison. RCW 9.94A.510. This penalty is still quite serious, and therefore weighs against interpreting RCW 46.61.522 as imposing strict liability. However, the penalty's weight is not as heavy as with vehicular homicide.

2. Potential for Harm to the Public

The potential harm to the public is not as great as with vehicular homicide. Whereas the latter crime requires a killing, vehicular assault requires only substantial bodily harm. However,

the legislature expressed its intent to "address[] a gap in the law that does not allow prosecution in cases where a person seriously injures another person" when it enacted the 2001 amendments to RCW 46.61.522. HB REP., S.B. 5790, 57th Leg., Reg. Sess., at 3 (2001). Therefore, our analysis in Section I(C)(5), above, applies here as well, since this offense is part of an overall statutory scheme to harshly penalize and thereby deter driving under the influence. The legislature intended to ensure that the potential for bodily injury resulting from driving under the influence be attended by the potential for graduated penalties, and therefore this factor weighs toward a strict liability reading.

3. Encompassing of Seemingly Innocent Conduct

Like RCW 46.61.520(1)(a), RCW 46.61.522(1)(b) imposes additional criminal liability for driving under the influence—itself a defined crime—based on the degree of harm realized. Yet unlike RCW 46.61.520(1)(a), RCW 46.61.522(1)(b) includes no express proximate cause requirement, instead requiring only a showing that the defendant "cause[d] substantial bodily harm." As noted above, the legislature was aware of this distinction when it passed the 2001 amendments. HB REP., S.B. 5790, 57th Leg., Reg. Sess., at 2 (2001).

In *Bauer*, discussed above, our Supreme Court considered the meaning of the word "causes" as used in the third degree assault statute. The court stated that before criminal liability is imposed, "the conduct of the defendant must be both (1) the actual cause, and (2) the 'legal' or 'proximate' cause of the result." 180 Wn. 2d at 935-36 (quoting *Rivas*, 126 Wn.2d at 453). Cause in fact refers to the "'but for'" consequences of an act, the physical connection between an act and an injury, which are the same in tort and criminal law. *Bauer*, 180 Wn. 2d at 936 (quoting *State v. Dennison*, 115 Wn.2d 609, 624, 801 P.2d 193 (1990)). On the other hand, legal causation involves a determination of whether liability should attach as a matter of law given the

existence of cause in fact. *Id.* If the factual elements of the tort are proved, determination of legal liability will be dependent on "'mixed considerations of logic, common sense, justice, policy, and precedent.'" *Id.* (quoting *Hartley*, 103 Wn.2d at 779).

The court in *Bauer* held that because criminal law and tort law serve different purposes, they have different principles of legal causation. *Id.* The court cited with approval to *LaFave*: "'[W]ith crimes, where the consequences of a determination of guilt are more drastic . . . it is arguable that a closer relationship between the result achieved and that intended or hazarded should be required.'" *Id.* at 936-37 (quoting 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(c), at 472 (2d ed. 2003)). The court also cited to Hart and Honore with approval: "'The wider doctrines of causation currently applied in tort law should not be extended to criminal law. . . . [I]n criminal law, . . . it is not normally enough merely to prove that [the] accused occasioned the harm; he must have 'caused' it in the strict sense.'" *Id.* (alterations in original) (quoting H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 350-51 (2d ed. 1985)). The court further cited to Hart and Honore for the proposition that "'[w]here [the first actor's] conduct was not sufficient [to bring about the harm] without the intervention of the second actor . . . most decisions relieve the first actor of responsibility.'" *Id.* at 940 (quoting HART & HONORE, *supra*, at 326). The court in *Bauer* ultimately held that "legal cause" in criminal cases differs from, and is narrower than, "legal cause" in tort cases in Washington. *Id.*

If legal cause is narrower or more restrictive in criminal law, then it makes no sense to interpret the 2001 amendments to the vehicular assault statute to require only the much looser and capacious standard of cause in fact. This is especially true when the 2001 amendments use simply "causes," which is the same term used in the statute at issue in *Bauer*. 180 Wn.2d at 935.

Following our Supreme Court's interpretation of the word "causes" as requiring both "actual" and "proximate" causation in *Bauer*, we interpret "causes" as used in RCW 46.61.522 as also requiring a showing of proximate cause. Accordingly, scenarios like the hypothetical stop-light collision we described in section I(C)(3), above, could not give rise to liability for vehicular assault where no such liability would attach for vehicular homicide. This factor, consequently, weighs in favor of strict liability.

As noted, the analysis of the remaining *Bash* factors does not differ from that in the analysis of vehicular homicide, above.

4. Conclusion

As with vehicular homicide, the *Bash* factors favor a strict liability interpretation of vehicular assault when committed by a driver under the influence of alcohol or drugs. Keeping the legislative history in mind as we view the *Bash* factors, we hold that the legislature intended vehicular assault by driving under the influence to be a strict liability offense. The trial court did not err by instructing the jury that it could convict without finding that Burch acted with ordinary negligence.

IV. APPELLATE COSTS

Burch argues that we should decline to impose appellate costs in her case. We agree.

Under RCW 10.73.160(1), we have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). We retain discretion to determine appellate costs after the decision terminating review. RAP 14.1(a). Burch requests that we exercise that discretion to waive her appellate costs.

Ability to pay is an important consideration in the discretionary imposition of appellate costs, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 389, 367

P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). In the context of trial court legal financial obligations (LFOs), our Supreme Court has recognized that if one meets the GR 34 standards for indigency, courts should seriously question that person's ability to pay LFOs. *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). Once indigency is established, the RAPs establish a presumption of continued indigency throughout review. *Sinclair*, 192 Wn. App. at 393. Specifically, RAP 15.2(f) states that:

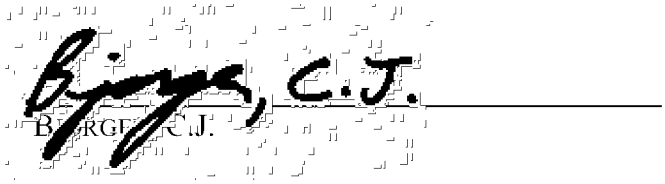
> [a] party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

At the conclusion of trial, the court issued an order of indigency allowing Burch to seek an appeal at public expense. In considering appellate costs, *Sinclair* held, as a general matter, that "the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*-e.g., 'increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.'" 192 Wn. App. at 391. With Burch's presumed continued indigency, the imposition of appellate costs would threaten these same evils. Therefore, following our recent decision in *State v. Grant*, No. 46734-8, 2016 WL 6649269 (Wash. Ct. App. Nov. 10, 2016), we exercise our discretion and decline to impose appellate costs on Burch.

CONCLUSION

We hold that to convict of vehicular homicide or vehicular assault, the State need not prove that a driver acted with ordinary negligence in the operation of a motor vehicle if it proves that the driver was under the influence of alcohol or drugs while driving that vehicle, along with

other elements of the offense. Accordingly, the trial court correctly instructed the jury, and we affirm Burch's convictions. We also decline to impose appellate costs.



BJORGEN, C.J.

We concur:

WORSWICK, J.

MAXA, J.

BACKLUND & MISTRY

January 27, 2017 - 3:22 PM

Transmittal Letter

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