

No. 67570-2-I

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

STATE OF WASHINGTON, Appellant,

v.

CARLI RENEE ALVARADO, Respondent.

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BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether there was substantial evidence to support the court's finding that the respondent never saw the car that she struck with her Jetta from the time she exited the parking lot to the point of impact where the respondent told the officer the day of the collision that she never saw the car, and at trial she testified she didn't see it until after the collision and didn't notice any cars in front of her after pulling out of the parking lot.
2. Whether findings of fact 25 and 33 should be taken as verities on appeal where respondent didn't argue within her brief that there was insufficient evidence to support them.
3. Whether there was substantial evidence to support the court's finding that the intersection of Cornwall and Virginia where the collision occurred was clearly visible from at least a full block away and partially visible from where respondent entered onto Cornwall where the commissioner personally viewed the scene, and the testimony and exhibits showed that portion of the road was straight, clear and didn't have any obstructions.
4. Whether there was substantial evidence to support the court's finding that any driver headed north at the intersection of Kentucky and Cornwall could have or should have seen a vehicle located at the location of the collision where the court found that the intersection where the collision occurred was clearly visible from at least a block away and found that the day was sunny and clear, and where the commissioner personally viewed the scene at defense request.
5. Whether there was substantial evidence to support the court's findings that the respondent's car traveling at a rate

of 25 mph 36.66 feet per second, would have a certain number of seconds to go a certain distance. Where the State provided testimony and exhibits about a time/distance analysis albeit at a different rate of speed, and where all the court did to arrive at the numbers was a simple mathematical calculation, like the one done in the State's time/distance analysis.

6. Whether there was substantial evidence to support the finding that the respondent's attention was diverted from the road for two to four seconds when she looked at her backpack and that she wasn't paying sufficient attention before that to see a car located at the point of impact well before that diversion where the majority of the testimony was that the respondent looked at the backpack for two to four seconds and where the road was clear, she could have and should have seen the car in front of her for at least one and a half blocks, and over 10 seconds, before she hit it.
7. Whether there is sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that the respondent operated her vehicle with disregard for the safety of others where respondent didn't pay attention to the road in front of her for over a block and a half and over ten seconds, was driving five mph over the speed limit in a school zone, looked away from the road for two to four seconds to look at her backpack and knowingly violated the restrictions on her intermediate license by having two of her teenage friends in the car with her.

C. FACTS

1. Procedural Facts

On January 21, 2011 Appellant C.A. was charged with one count of Vehicular Homicide, in violation of RCW 46.61.520(1)(c), for her actions on September 30, 2010. CP 136-37. She was tried on June 2011 at a bench trial before the Honorable Commissioner Alfred Heydrich.

Commissioner Heydrich found C.A. guilty and later imposed a manifest injustice down disposition. CP 13-20.

2. Substantive Facts

In the early afternoon of Sept. 30th, Melissa Brulotte, along with her 2 ½ year old daughter Anna, met her other two children at Assumption School in Bellingham. FF 1, 15; 1RP 32.¹ The family started walking north on the sidewalk along Cornwall Avenue to take one of the children to music lessons. 1RP 35. It was a sunny and dry day. FF 5.

Around the same time, Christine Bron was driving her Escort north on Cornwall Avenue. FF 13. After turning her turn signal on, she started to turn right onto Virginia Street, but stopped when she saw the Brulotte family starting to cross Virginia Street, at the north end of the block on which the Assumption School was located. FF 7, 12, 13, 14; Ex. 2, 8, 69. When her car was stopped, a portion of the back end of the car remained in the northbound lane of Cornwall Avenue. FF 14.

Shortly before this around 2:30 p.m, C.A. had met up with her two friends from the volleyball team, Samantha and Nicholia, after school at Bellingham High School. FF 1; 1RP 78; 3RP 51. The girls were going to

¹ The verbatim report of proceedings are referred to as follows: 1RP – Vol. I, June 7th, 2011; 2RP – Vol. II, June 8th; 3RP – Vol. III, June 9th; 4RP – Vol. IV, June 10th; 5RP – Vol. I, June 13th; 6RP - June 14; 7RP – July 29th.

get something to eat at one of the girl's homes before they had to go to a volleyball game later that evening. 2RP 9; 3RP 52. The Bellingham High School is located in the next block south from the Assumption School. FF 7. C.A. and her friends went out to her car parked in the high school's parking lot which is located at the south end of the block and bordered by Cornwall Avenue. FF 1, 5; Ex. 69, 70. C.A. tried to call her mother to get permission to drive her two friends, but was unable to contact her. FF 2. C.A. knew it was a violation of her intermediate license, a license which she had had for a little over two months, to have non-family members under the age of 20 years old in her car while she was driving. FF 1, 34.

The girls got into C.A.'s car, a Jetta. FF 3. Nicholia sat in the back behind C.A. and Samantha sat in the front passenger seat. FF3. The radio was on, but not loud, and C.A. and Samantha were talking with one another. 2RP 11; 4RP 60. C.A. turned right onto Cornwall Avenue out of the parking lot and headed north on Cornwall Avenue. FF 5. The speed limit at the high school was 25 miles per hour, but there was a school zone which started in the next block and was marked by a flashing signal. FF 6, 7. C.A. was aware of the speed limit. FF 6.

After C.A. turned onto Cornwall Avenue, Samantha saw a male friend of hers walking along the sidewalk on Cornwall Avenue. FF 8, 2RP 11. C.A. saw him as well. 4RP 23. Both Samantha and Nicholia rolled

down the passenger windows on the right side of the car and called out to him to get his attention. FF 8. He, however, apparently didn't hear them and didn't respond. 2RP 11; 4RP 85.

C.A. and Samantha continued talking. 2RP 12; 3RP 53; 4RP 89, 91. C.A. asked Nicholia to hand up her backpack from the back seat so that she could show Samantha a caterpillar she had in it. FF 10; 4RP 26-27, 41. After C.A. noticed the flashing school zone signal she slowed her car down. FF 9. C.A. asked Samantha to look in the backpack, but Samantha couldn't figure out where in the backpack C.A. meant. FF 10, 11. C.A. then turned her head, looked down and pointed at the backpack. FF 11. After Nicholia saw C.A. point to the backpack, Nicholia looked at the windshield and saw the Bron Escort stopped in front of them. FF 12; 4RP 91. Before she could say anything and before C.A. ever looked up from the backpack, the Jetta struck the Escort, which was stopped at the intersection with Virginia Street. FF 12, 15, 24. C.A. was looking at the backpack for about two to four seconds before the collision. FF 32.

The impact caused the Escort to travel into the unmarked crosswalk at Virginia Street and to hit both Anna and Melissa Brulotte. FF 15. Anna was projected forward and then run over by the Escort causing her massive head trauma and her immediate death. FF 16. Melissa was projected up onto the hood of the Escort and struck her head on its lower

windshield, breaking it. FF 17. She was then projected onto the sidewalk area on the northeast corner of Cornwall Avenue and Virginia Street. FF 17. The Escort came to a resting point on the sidewalk along Cornwall Avenue north of the intersection with Virginia Street. FF 18. After hitting the Escort, the Jetta came to a stop in the marked crosswalk on Cornwall Avenue just north of the intersection with Virginia. FF 19.

At no time after turning onto Cornwall Avenue from the high school parking lot did C.A. ever see the Escort driving or stopped in front of her. FF 24. While she remembered cars driving south, she never “noticed” any cars going north. 4RP 22-23. The road was clear and straight from the high school parking lot to the intersection of Cornwall and Virginia. FF 25. Any driver driving that portion of Cornwall Avenue would have and should have seen a car stopped to turn right onto Virginia Street. FF 27, 32.

While the State presented evidence and argued that C.A. was driving at 32 mph at the time she hit the Escort, defense argued she was only driving around 25 mph and the commissioner found that the 25 mph rate was a more accurate estimate of her speed at the point of the Jetta’s impact with the Escort. FF 20-23. Given that rate of speed, the equivalent of 36.66 feet per second, C.A. would have had 10.9 seconds to observe the Escort in front of her from around the intersection of Kentucky and

Cornwall Avenue, one block south from the intersection with Virginia. FF 28. At that rate of speed, C.A. would have had 5.7 seconds to observe the Escort from the point of the flashing school zone signal, 210 feet from the intersection with Virginia Street. FF 30. C.A. did not pay sufficient attention to the road in front of her well before the time she looked at her backpack and should have seen the Escort at the intersection of Cornwall Avenue and Virginia Street. FF 32. The State met its burden to prove beyond a reasonable doubt that C.A. was guilty of vehicular homicide. CL 1, 2.

D. ARGUMENT

On appeal C.A. argues that the commissioner erred in concluding that the evidence showed beyond a reasonable doubt that the element of disregard for the safety of others had been met. Specifically C.A. asserts that exceeding the speed limit by 5 miles per hour (“mph”), as the court found, is not sufficient to prove disregard for the safety of others, and similarly, she asserts that evidence that she was distracted for one to four seconds is not sufficient to prove disregard for the safety of others. Finally, she asserts that the commissioner impermissibly made some time distance calculations, based on a time/distance study admitted by the State, and that those calculations are not supported by the record. The

commissioner's conclusion that C.A. drove with disregard for the safety of others was not based solely on her exceeding the speed limit, nor solely based on her distraction caused by looking at her backpack for *two* to four seconds, as the commissioner found. Rather it was based cumulatively on the evidence, and in large part upon the fact that C.A. did not see the Escort at any time, and should have, from the time she turned onto Cornwall Avenue out of the high school parking lot to the time of impact, over a block and a half and over ten seconds away. There is substantial evidence to support the findings of fact challenged by C.A. Taking the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that C.A. drove with disregard for the safety of others when due to her gross inattention she failed to see the Escort ahead of her on the road for over a block and a half and for over ten seconds, and when she was driving five mph over the speed limit, looked away from the road at her backpack for two to four seconds right before the collision and violated the restrictions on her intermediate license by having two of her teenage friends in the car with her.

1. There was substantial evidence in the record to support each of the challenged findings of fact.

C.A. has assigned error to findings of fact numbers 24, 25, 27, 28, 29, 30, 31, 32, and 33.² Findings of fact challenged on appeal are evaluated for substantial evidence; unchallenged findings are deemed verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair minded, rational person of the truth of the finding. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).³ The [trier of fact] ‘is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference.’ State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999) (*quoting State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)).

a. Findings of Fact 25 & 33

While C.A. assigned error to findings of fact 25 and 33, she does not argue in her brief that there is insufficient evidence to support those findings. Therefore, findings of fact 25 and 33 should be taken as verities

² C.A. only filed an objection to findings of fact 31 and 32 below. CP 43-44.

³ C.A. cites to civil cases related to motions for a new trial for the legal standard regarding “substantial evidence.” Brief at 11. While criminal caselaw is the relevant standard, it appears that the civil standard cited is not significantly different.

on appeal. In addition, there is substantial evidence to support both those findings in the record.

Finding of fact 25 states:

The evidence presented as well as the view of the scene conducted by the Court demonstrates that the intersection of Virginia Street and Cornwall Avenue, where the collision took place, is clearly visible from at least a full block away at the intersection of Kentucky Street and Cornwall Avenue. This intersection is also partially visible from the point where Ms. Alvarado entered Cornwall Avenue from the Bellingham High School parking lot.

CP 24, FF 25 (See Appendix A). As was referenced by the finding of fact, this finding was based on the evidence as well as the commissioner's view of the scene. At defense request, the commissioner had viewed and walked the scene. 3RP 68-69; 4RP 5. The commissioner noted on the record that he walked the scene from Ohio Street, just south of where C.A. turned right onto Cornwall Avenue from the Bellingham High School parking lot, up to the intersection of Virginia and Cornwall, and beyond to where the Escort came to rest, noting the presence of the telephone pole, the flashing school zone signal and other items about which there had been testimony. 4RP 5-7. Plaintiff's Exhibit 2, 8 and 68, as well as Defense Exhibits 69 and 70, demonstrated that the portion of Cornwall Avenue C.A. drove, from the parking lot to the intersection with Virginia Street, was straight, clear, with no obstructions. The northbound lane that C.A. was driving in had a parking aisle and adjacent to the parking aisle, a bike

lane. 2RP 58, Ex. 8. There is sufficient evidence in the record to persuade a fair minded, rational person of the truth of the commissioner's finding that the intersection of Cornwall and Virginia St, where the collision occurred, was clearly visible from at least a full block away and was at least partially visible from where C.A. entered onto Cornwall Avenue.

There is also substantial evidence in the record to support the finding that "Any distraction that may have occurred in this case was not caused by either passenger nor by an outside event." CP 25 FF 33. The defense theory was that the only distraction to C.A. in this case was C.A.'s looking at her backpack for a couple seconds and that didn't rise above ordinary negligence. 2RP 25-26; 5RP 90, 93-94. In discounting the violation of the license restrictions, defense argued: "There is no evidence that but for the presence of these 2 young girls in the car that C.A. wouldn't have been looking at the backpack anyway. It was her idea to look at the backpack." 5RP 93. The testimony showed that C.A. was the one who asked the other girls to get her backpack and look inside it because she wanted to show Samantha a caterpillar she had inside one of the pockets. 2RP 12-13, 53-55; 4RP 26-29, 41, 48, 69-71. There was also testimony that while the other girls attempted to get the attention of a friend of Samantha's who was walking along the sidewalk, the friend apparently didn't hear them and didn't react in any manner. 2RP 11, 89;

4RP 23-24, 64-65, 85-86. There was no other testimony about possible distractions. There is sufficient evidence in the record to persuade a fair minded, rational person of the truth of the commissioner's finding that any distraction was not caused by the passengers in the car or by events occurring outside.

b. Finding of Fact 24 C.A. never saw the Escort until after collision

C.A. argues that there is insufficient evidence to support finding of fact 24 because C.A. testified that she did not recall seeing any vehicles traveling north and that "not recalling" is not the same as "not seeing." Brief at 21.

Finding of fact 24 states:

During the entire drive time from leaving the Bellingham High School parking lot to the point of impact, Ms. Alvarado never saw the Bron vehicle until after the collision.

C.A. also told the officer on the day of the collision that she never saw the Escort. 2RP 89. C.A. testified on direct that when she pulled out of the parking lot onto Cornwall Avenue that she remembered cars traveling south, but didn't recall any traveling north and that when she pulled out into traffic she "didn't take notice" of any cars in front of her, or of any behind her. 4RP 22-23. She testified that her attention was diverted from the road to her backpack for two to three seconds after her car passed the

flashing school zone signal, and then they collided with the Escort. 4RP 28-30. When asked on direct “Did you see the black car in front of you at any point?”, she testified that she saw it *after* she collided with it. 4RP 31 (emphasis added). On cross examination, she testified that she did not see any cars going north as she was driving north, and then added, “not that I recall.” 4RP 42. When she was asked on cross, “Could you see a car at all on the roadway?” when she was close to the Assumption School, she testified “Not that I noticed.” RP 42-43. She was also asked: “At the point when you struck the car, you had not seen this car at all; is that correct?” She answered: “That’s correct.” She also testified she didn’t remember seeing any cars driving north at all. 4RP 45.

C.A.’s statement to the officer and her testimony support the finding that she never saw the Escort until she struck it. There was no testimony that C.A. ever saw the Escort before she hit it. C.A. did remember observing the traffic as she turned onto Cornwall, she remembered seeing Samantha’s friend walking along the sidewalk, she remembered seeing cars going south as she drove north, she remembered seeing the flashing school zone signal and she remembered looking down at her backpack. 4RP 22-23, 26, 28-29. C.A. remembered a lot of details about what happened that day. It is reasonable to conclude that if she had seen the Escort at some point while she was driving north on Cornwall

Avenue, she would have remembered seeing it. There is sufficient evidence in the record to persuade a fair minded, rational person of the truth of the commissioner's finding that C.A. never saw the Escort until after she hit it.

c. Finding of Fact 27

C.A. also contests finding of fact 27 which states:

Any driver headed north on Cornwall Avenue at the intersection of Kentucky Street and Cornwall Avenue, could have or should have seen any vehicle located at least 400 feet ahead of him or her at the location of the collision.

This finding of fact flows in part as a permissible inference from the finding in finding of fact 25 that the intersection of Virginia Street and Cornwall Avenue, where the collision took place, is clearly visible from at least a full block away, at the intersection of Kentucky Street and Cornwall Avenue. It also flows from the commissioner's finding that the day was clear and sunny. CP 22, FF 5. No others cars were in between the Escort and the Jetta during that stretch of road. 1RP 48-49, 75, 93; 2 RP 26. If the roadway was straight, clear, without obstructions, and there were no cars in between C.A.'s car and the Escort, then a driver in C.A.'s position could have and should have seen the Escort in front of her if the driver were paying attention to the road. This finding of fact was a reasonable inference from the other findings of fact and from the exhibits

and testimony that showed that the road was straight, clear and allowed for good visibility for over a block away from the intersection of Cornwall and Virginia. See argument *infra* at 10-11. The commissioner would have also been permitted to make this finding from his view of the scene.

d. Findings of fact 28-31 – time/distance calculations

C.A. next contends that findings of fact 28 – 31 are not supported by substantial evidence and that the commissioner became an “expert” in order to be able make those findings. Findings of fact 28 – 31 are clearly based on the time/distance analysis that Office Cristelli did and about which he testified. While the officer’s analysis was premised on a different, greater, rate of speed, the commissioner’s use of that analysis and the underlying common unit of measure conversion did not require any special knowledge in order to make those findings. The commissioner based them on the testimony about the time/distance analysis, but used the defense rate of speed in the analysis instead of the State’s rate of speed. Whether considered a permissible inference from the facts or judicial notice of the unit of measure conversion mathematical formula, it was well within the commissioner’s authority to make those findings.

Findings of fact 28 states:

Traveling at a speed of 25 miles per hour, Ms. Alvarado would have been travelling at 36.66 feet per second. At a distance of 400

feet, roughly the vicinity of the intersection of Kentucky Street and Cornwall Avenue, Ms. Alvarado would have had 10.9 seconds to see a car located a (sic) point of impact of the two vehicles involved in this collision.

CP 24, FF 28. Findings of fact 29-30 state that at 300 feet C.A. would have had 8.2 seconds to see the car; and at 210 feet, the location of the flashing school zone signal, she would have had 5.7 seconds. CP 24, FF 29, 30. Finding of fact 31 states that if C.A. had been travelling at 20 mph 210 feet before impact, at and after she passed the school zone signal, she would have had greater than 5.7 seconds to see the Escort. CP 24, FF 31.

Officer Cristelli, a Bellingham police officer in the traffic and reconstruction division, testified about the time/distance analysis he performed based on the State's evidence⁴ that C.A. was driving her car at a rate of 32 mph at the time of impact. 2RP 193, 199-200. His time distance analysis showed that at 328 feet out from impact traveling at 32 mph/46.9 feet per second constant velocity, there would have been seven

⁴ There was extensive testimony from Officer Leake, a senior officer and expert with experience in technical collision investigation and reconstruction, regarding a couple of different analyses he performed, the Searle formula, the throw distance formula, slide-to-stop calculation, and kinetic energy model, in order to arrive at a rate of 32 mph. 2RP 53-54, 57, 96-113. The defense theory rested on a crush analysis that the defense expert, a mechanical engineer with expertise in motor vehicle collision analysis, performed and about which he testified. 4RP 134-35, 186-211. Officers Leake and Cristelli testified as to why they didn't believe that the crush analysis was a reliable method of determining the Jetta's speed at the point of impact with the Escort, but the commissioner found that the defense expert's analysis was a more accurate method of estimating the speed of the Jetta and determined that the Jetta was traveling about 25 mph at the time of impact with the Escort. FF 22, 23.

seconds until impact; at 281 feet there was six seconds; at 234 feet, there was five seconds to impact; and at the flashing school signal, 210 feet from impact, there was 4.47 seconds. Ex. 60-67; 2RP 201-206; 3RP 6, 8. The feet per second numbers were conversions of miles per hour into a feet per seconds unit of measurement. 2RP 203. All the commissioner did was a simple mathematical equation: the defense rate of speed of 25⁵ (mph) multiplied by 5280 (feet) = 132,000, divided by 3600 (seconds) results in 36.66 feet per second.⁶

C.A. asserts that the time/distance findings are faulty because defense objected to that evidence based on foundation and speculation. The initial objection was that there weren't facts to support the State's assertion that C.A. was going 32 mph, not that there was anything wrong regarding the time distance calculation itself. 2RP 208-09. While the commissioner initially sustained the objection, he later permitted the admission of that testimony and evidence after the State provided the information, the distance in feet from the point of impact, the commissioner felt was necessary for admission. 3RP 10-11. When

⁵ C.A. does not challenge this finding of fact on appeal. CP 23, FF 23.

⁶ One mile = 5280 feet. Merriam Webster's Collegiate Dictionary, 10th Ed. 1996. 60 minutes x 60 seconds = 3600 seconds in one hour. Another means of calculating it would be to convert miles per hour into a feet per second multiplier. 5280 feet/3600 seconds produces a multiplier of approximately 1.466/1.467. 25 times 1.466 results in 36.65 feet per second and 25 times 1.467 results in 36.67 feet per second.

defense counsel continued to object, the commissioner explained that the calculation was fairly simple and all that the officer needed to calculate the length of time to impact was the speed and the distance. 3RP 11. On cross-examination Officer Cristelli admitted that if it was determined that C.A. was not going 32 mph at the time, then his study, the produced exhibits, would not be accurate and the analysis would need to be modified. 3RP 21-22, 29. He also testified that a similar analysis could be performed using the 25 mph number, but that he had not done those calculations. 3RP 31-35.

Contrary to C.A.'s assertion, the commissioner did not become his own expert in order to make findings 28-31. Logically, if C.A. was not driving as fast as the State argued she was, it would have taken more time for her to reach the point of impact than if she were traveling at a higher rate of speed. The commissioner just used the unit of measurement conversion calculation, one that had been used by Officer Cristelli in his time/distance analysis, and applied it to the 25 mph rate that defense argued was the more accurate estimate of C.A.'s pre-impact speed. The unit of measurement conversion calculation was based on Officer Cristelli's testimony and the exhibits, and was a reasonable, permissible inference from that evidence. Moreover, it was also something of which the commissioner could have taken judicial notice, particularly in light of

the testimony. ER 201(b)(2); *see, Fusato v. Washington Interscholastic Activities Assn.*, 93 Wn. App. 762, 970 P.2d 774 (1999) (court may take judicial notice of facts not subject to reasonable dispute); *see also, Sintra, Inc. v. City of Seattle*, 96 Wn. App. 757, 763, 980 P.2d 796 (1999), *rev. denied*, 140 Wn.2d 1021 (2000) (trial court is permitted to make mathematical calculation on remand where appellate court's mandate does not require exercise of discretion by trial court); *Yarno v. Hedlund Box & Lumber Co.*, 129 Wash. 457, 482, 225 P.659 (1924) (court is competent to make mathematical calculation).

FF 31 was a reasonable and permissible inference that followed from the commissioner's finding that at the flashing school zone signal at 25 miles per hour, there was 5.7 seconds until the point of impact, and therefore, logically if C.A. had been traveling at a slower rate of speed, 20 mph, it would take greater than that 5.7 seconds for her car to reach the point of impact. There is sufficient evidence in the record to persuade a fair minded, rational person of the truth of the commissioner's findings 28-31.

e. Finding of Fact 32

The next finding C.A. asserts is not supported by substantial evidence is number 32, specifically asserting that the evidence showed

that C.A. was distracted only from one to four seconds and that the finding that she wasn't paying sufficient attention was based on conjecture.

Finding of fact 32 states:

Ms. Alvarado's eyes were not on the roadway in front of her for the last two to four seconds prior to the collision, while she was looking at the backpack on her passenger's lap. In addition, she was not paying sufficient attention to the roadway well before this time frame to see a car located at the point of impact of the two vehicles involved in this collision.

CP 24, FF 32. C.A. herself recognizes that the testimony from the girls supports a finding of one to four seconds of distraction. Brief at 19-20. While C.A. told the officer at the scene that she didn't recall how long her attention was diverted, on the stand she testified that she looked away from her driving for 2-3 seconds and estimated that she was looking down for three seconds. 2RP 90, 4RP 30, 43, 49. She did not look up until her car hit the Escort. 4RP 30. Samantha testified that C.A. looked at the backpack for a couple seconds and that by "couple" she meant "Probably two, four." 4RP 71. Nicholia testified that she saw C.A. reach her hand over and look at the backpack for two seconds, and then Nicholia looked up and saw the Escort through the front windshield and realized after one to two seconds that the car was stopped and then they hit the car. 3RP 55-56; 4RP 90. While Nicholia testified that she thought C.A.'s eyes were diverted for one to two seconds, that did not factor in the time it took

Nicholia to register that the Escort was stopped, which was about two to three seconds, and the testimony was clear that C.A. did not look up again until they hit the Escort. Adding those times together would result in a three to five second time period of distraction. There is substantial evidence in the record to support the commissioner's finding that C.A. looked away from the roadway for between two and four seconds.

There is also substantial evidence in the record to support the finding that she was not paying sufficient attention to the roadway well before the period of time when she was looking at her backpack in order to see a car located in front her at the point of impact. This finding also arises in part as a reasonable, permissible inference from findings 24, 25, 27 and 28. Given the layout of Cornwall Avenue, the conditions for driving that day, and the distance to the intersection, C.A. should have seen the Escort in front of her. There is no reasonable explanation for her not having seen the Escort from at least the intersection of Kentucky and Cornwall, and frankly from the time she turned onto Cornwall Avenue from the parking lot, to the point at which she looked down at her backpack. She clearly could have and should have seen the Escort stopped at the intersection of Cornwall and Virginia before she hit it and before she looked down at her backpack. It was reasonable for the commissioner to conclude then that it was her inattention to the road in

front of her that caused her not to see the Escort well before the time that she looked down at her backpack. In addition, finding of fact 28 reflected that she would have had close to 11 seconds traveling at 25 mph, the equivalent of 36.66 feet per second, from roughly the vicinity of the Kentucky and Cornwall Avenue intersection for her to see the Escort in front of her, but she did not.

2. **Taking the evidence in the light most favorable to the State there was sufficient evidence for a rational trier of fact to have found that C.A. drove her car with disregard for the safety of others when she didn't pay attention to the road in front of her for over a block and a half and over ten seconds, was driving five mph over the speed limit in a school zone, looked away from the road for two to four seconds to look at her backpack and knowingly violated the restrictions on her intermediate license by having two of her teenage friends in the car with her.**

C.A. contends that there was insufficient evidence for the court to find the element that she drove with disregard for the safety of others beyond a reasonable doubt. She asserts specifically that five mph over the speed limit is insufficient evidence of the "aggravated negligence" required to support a finding of disregard for the safety of others. She similarly asserts that a one to four second distraction is insufficient evidence of "aggravated negligence" as well. The commissioner's conclusion that C.A. drove with disregard for the safety of others,

however, was not based only that evidence, but also on the fact that C.A. did not see the Escort in front of her at any point in time after she entered onto Cornwall Avenue before the collision, that she should have seen the car given the roadway conditions for over a block before the point of impact, and that she would have had over 10 seconds to see a car in front of her from a block away given her rate of speed. C.A.'s gross inattention to the roadway in front of her for over a distance of a block and for around 10 seconds, coupled with her distraction inside the car from the backpack seconds before impact, exceeding the speed limit by 5 mph, and violating the restrictions of her intermediate license, cumulatively, was the basis for the commissioner's conclusion as to this element. Taking the evidence in the light most favorable to the State, that evidence was sufficient to support a rational trier-of-fact's conclusion that C.A. drove with disregard for the safety of others beyond a reasonable doubt.

Under a sufficiency of the evidence analysis, the test is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying the test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Joy, 121 Wn.2d at 339. Such a challenge admits

the truth of the State's evidence and all reasonable inferences therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial evidence is as reliable as direct evidence. State v.

Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). The [trier of fact] "is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference." State v.

Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999) (*quoting State v.*

Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)).

There was no dispute below as to the standard the court was to apply regarding the element of "disregard for the safety of others." Both the State and defense relied upon the standard in State v. Eike, 72 Wn.2d 760, 765-66, 435 P.2d 680 (1967) in their arguments, and that was the standard the commissioner applied. 5RP 92, 95; 6RP 13-14. Under Eike, ordinary negligence is insufficient to prove to prove the element of driving with "disregard for the safety of others." Eike, 72 Wn.2d at 765-66,:

... [I]f one drives a motor vehicle upon the public highways with disregard for the safety of others, this implies an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term 'negligence.' Every violation of a positive statute, from a defective taillight to an inaudible horn may constitute negligence under the motor vehicle statutes, yet be unintentional, committed without knowledge, and amount to no more than oversight or inadvertence but would probably not sustain a conviction of negligent homicide. To drive with disregard for the safety of others, consequently, is a

greater and more marked dereliction than ordinary negligence. It does not include the many minor inadvertences and oversights which might well be deemed ordinary negligence under the statutes.

Id. “Disregard for the safety of others” therefore means something more than ordinary negligence or oversight but less than recklessness. Evidence of some conscious disregard for the safety of others is necessary to support a finding of driving with disregard for the safety of others. State v. Vreen, 99 Wn. App. 662, 672, 994 P.2d 905 (2000), *aff’d on other grounds*, 143 Wn.2d 923 (2001).

C.A. cites to a couple of cases to highlight their distinctions from the factual situation in her case. They are not factually comparable, in large part due to the fact that alcohol was involved.⁷ A review of other cases where alcohol was not involved or considered in determining the issue of disregard for the safety of others indicate that the issue tends to be rather fact specific. *See e.g., Eike, supra* (defendant drove with disregard for safety of others when he drove at high rate of speed, but within limit, on dark, wet highway, and rounded a sweeping curve on the wrong side of road); State v. Sanchez, 42 Wn. App. 225, 711 P.2d 1029 (1985), *rev. denied*, 105 Wn.2d 1008 (1986) (substantial evidence of disregard for

⁷ *See, e.g., State v. Knowles*, 46 Wn. App. 426, 730 P.2d 738 (1986); State v. Coates, 17 Wn. App. 415, 563 P.2d 208 (1977).

safety of others was met by evidence that defendant was driving too fast for conditions of the road resulting in the car fishtailing when his view of oncoming traffic was limited due to upcoming hill).

C.A. also cites to State v. Lopez, 93 Wn. App. 619, 970 P.2d 765 (1999), a split decision, in support of her argument that her infractions amounted to no more than minor oversights that are insufficient to support a finding of driving with disregard for the safety of others. Lopez, however, involved a minor who drove only without a license and without driver's educational training. The case only stands for the proposition that "a minor's status as an unlicensed driver is not enough to establish beyond a reasonable doubt a disregard for the safety of others." *Id.* at 623. In doing so, the court noted that while the doctrine of negligence per se based on a statutory violation had generally been abolished in Washington, breach of a statutory duty is admissible, although not conclusive, evidence on the issue of negligence. *Id.* at 622-23. It also noted there was no other evidence, speeding or otherwise, in the case to show the minor's conscious disregard for the safety of others. *Id.* at 623.

But here, C.A.'s conduct was not limited to just the two infractions of exceeding the speed limit and violating her license restrictions. The commissioner's conclusion that she drove with disregard for the safety of

others was not based on just those infractions. In issuing his oral findings, the commissioner explained his conclusion as to this element:

At the intersection of Kentucky and Cornwall, Carli had a clear view of the Virginia Street intersection. And that would have been close to 11 seconds before point of impact. 11 seconds to see the Bron car. She knew she was in a school zone where other children were likely to be present. She was traveling with two friends in her car who had no lawful right to be there. Her attention was diverted in the last seconds to the pack that was on her friend's lap, but this diversion was of her own making. The fact that she never saw the Bron car at any time prior to impact, given the lengthy sight lines available to her, tells me that she was not paying attention to the road long before she looked down at this pack.

Such lengthy inattention in this case takes Carli's conduct, in my opinion, beyond the range of ordinary negligence and places her driving well within the legal definition of disregard for the safety of others.

6RP 15. The commissioner did not make this decision lightly: he waited a day to make his findings and reviewed nearly 100 cases. 6RP 4-5, 14. Nor did the commissioner reach his conclusion simply because of the tragic result in this case, as C.A. implies. C.A.'s gross inattention to her driving, not paying attention to the road in front of her for over a block and nearly 11 seconds, and creating a distraction for herself while she knew she was within a school zone, is substantial evidence of more than ordinary negligence, of a greater and more marked dereliction than ordinary negligence. Taking the evidence in the light most favorable to the State, the evidence that C.A. drove in violation of her license restrictions and in

violation of the speed limit within a school zone; her lengthy inattention to the roadway in front of her, for over a block and over 10 seconds; and her creation of a distraction for herself within the car was sufficient evidence for a rational trier of fact to find that she drove with disregard for the safety of others. Her conviction for vehicular homicide should be upheld.

3. C.A.'s request for attorney's fees should be denied.

C.A. has requested the award of attorneys' fees on appeal. The State requests that these be denied first and foremost because it requests that her conviction be upheld on appeal, and secondly because there is no provision under the rules for an award of attorneys' fees in criminal cases.

Appellate costs are awarded in accord with Title 14 of the Rules of Appellate Procedure. RAP 14.3 provides:

Only statutory attorney fees and the reasonable expenses actually incurred by a party for the following items which were reasonably necessary for review may be awarded to a party as costs: (1) preparation of the original and one copy of the report of proceedings, (2) copies of the clerk's papers, (3) preparation of a brief or other original document to be reproduced by the clerk, as provided in rule 14.3(b), (4) transmittal of the record on review, (5) expenses incurred in superseding the decision of the trial court, but not ordinarily greater than the usual cost of a commercial surety bond, (6) the lesser of the charges of the clerk for reproduction of briefs, petitions, and motions, or the costs incurred by the party reproducing briefs as authorized under rule 10.5(a), (7) the filing fee, and (8) such other sums as provided by statute. If a party has incurred an expense for one of the designated items, the item is presumed to have been reasonably necessary for

review, which presumption is rebuttable. The amount paid by a party for the designated item is presumed reasonable, which presumption is rebuttable.

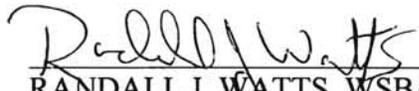
RAP 14.3(a).

RCW 10.73.160 authorizes recoupment of appellate costs from a convicted defendant but does not authorize imposition of such costs upon the State. Under RCW 4.84.080 statutory attorney fees in civil appeal cases is limited to \$200. A criminal defendant, however, may not collect statutory attorney fees pursuant to RCW 4.84.080. State v. Keeney, 112 Wn.2d 140, 769 P.2d 295 (1989); State v. Obert, 50 Wn. App. 139, 747 P.2d 502 (1987). There is no authority for the award of an appellant's attorneys fees in criminal cases and the request should be denied.

E. CONCLUSION

Based on the foregoing, the State respectfully requests that C.A.'s conviction for vehicular homicide be affirmed and the request for attorneys' fees denied.

Respectfully submitted this 4th day of April, 2012.

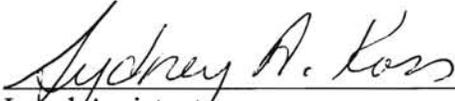


RANDALL J. WATTS, WSBA#6314
for HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Respondent/ Cross-Appellant's attorney, Mark Kaiman, addressed as follows:

MARK AARON KAIMAN
Lustick Law Firm
222 Grand Avenue, Suite A
Bellingham, WA 98225-4427



Legal/Assistant



Date

APPENDIX A

FILED IN OPEN COURT
7-29 2011
WHATCOM COUNTY CLERK
By UK
Deputy

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

In the Matter of:

11-8-00026-3

CARLI RENEE ALVARADO
Juvenile,

FIRST AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter having come on before the above-entitled Court for trial, and the Respondent, **Carli Renee Alvarado**, being personally present and being represented by her counsel, Jeffrey A. Lustick, and Mark A. Kaiman, and the State of Washington being represented by David S. McEachran, Prosecuting Attorney in and for Whatcom County, and the Court being fully advised in the premises, now, therefore, enters the following

Findings of Fact

1. On the 30th day of September, 2010, Carli Alvarado, a 16 year old student at Bellingham High School in the City of Bellingham, Whatcom County, Washington, went out to her 2001 Volkswagen Jetta automobile shortly after 2:30 PM with her friends Samantha Wright and Nicholia Kenison. Both Ms. Wright and Ms. Kenison were under the age of 20, and were not related to Ms. Alvarado.
2. Ms. Alvarado attempted to call her mother and get permission to drive her car with her friends as passengers. She was unable to reach her mother by phone.
3. All three girls got into Ms. Alvarado's vehicle. Ms. Alvarado was the driver and Ms. Wright was in the front seat and Ms. Kenison was in the back seat behind the driver.

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- 1 4. Ms. Alvarado knew that since she had her driver's license for a little over two months she
2 was committing a traffic infraction by carrying passengers under the age of 20 in her car
3 that were not related to her.
- 4 5. Ms. Alvarado drove to the exit on the northwest corner of the parking lot and turned
5 north on Cornwall Avenue. Cornwall Avenue runs north and south of Bellingham High
6 School with a slight uphill grade to the north of 1%. It was a sunny and dry day.
- 7 6. The speed limit north from Bellingham High School was 25 miles per hour, and Ms.
8 Alvarado was aware of that speed limit.
- 9 7. The Assumption Church and School are in the next block north from the High School and
10 the speed limit reduces to 20 miles per hour, when a flashing amber light indicates that
11 this is a reduced speed limit school zone. The reduced speed limit was in effect at the
12 time of the events in this matter.
- 13 8. As the Alvarado vehicle travelled north on Cornwall Avenue, one of the passengers
14 noticed a friend walking on the sidewalk on the east side of Cornwall Avenue. Ms.
15 Wright and Ms. Kenison rolled down their windows on the passenger side of the vehicle
16 to try and gain his attention.
- 17 9. All three girls saw the yellow flashing School Zone light south of Assumption School at
18 this time, and Ms. Alvarado slowed her vehicle down.
- 19 10. During the time that Ms. Alvarado was driving her car north of the Bellingham High
20 School she asked Ms. Wright to look in her backpack for an item. Ms. Wright was
21 holding the backpack on her lap at that time.
- 22 11. Ms. Wright didn't know which compartment to look in, and Ms. Alvarado turned her
23 head to the right to look at the backpack and also pointed with her right hand at the
24 backpack.
- 25 12. From the backseat Ms. Kenison looked out the windshield of the car and could see a
26 black Ford Escort stopped ahead of them at the intersection of Cornwall Avenue and
27 Virginia Street. Before she could say anything, the Alvarado vehicle struck the black
28 Ford Escort.
- 29 13. The black Ford Escort was being driven by Christine Bron. Ms. Bron had travelled North
30 on Cornwall Avenue ahead of the Alvarado vehicle intending to turn east on Virginia
31 Street.
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- 1 14. Ms. Bron stopped her vehicle to allow the Brulotte family to walk across Virginia Street,
2 south to north, and had her right turn indicator on at that time. When she stopped her car
3 a portion of the vehicle remained in the northbound lane of Cornwall Avenue.
- 4 15. Seconds after Ms. Bron stopped her car, she was struck by the Alvarado vehicle causing
5 her to travel into the unmarked crosswalk on Virginia Street, striking both 2 ½ year old
6 Anna Brulotte and Melissa Brulotte.
- 7 16. Anna Brulotte was projected forward and was then run over by the Bron vehicle,
8 suffering massive head trauma and died instantly from her injuries.
- 9 17. Melissa Brulotte was projected forward and thrown onto the hood of the Bron vehicle,
10 striking her head on the lower portion of the windshield, breaking it, and then being
11 projected on the sidewalk area of the northeast corner of Cornwall and Virginia Streets.
- 12 18. The Bron vehicle continued northward on the east sidewalk of Cornwall Avenue after
13 striking Anna and Melissa Brulotte, and came to rest approximately 160 feet north of the
14 point of impact.
- 15 19. The Alvarado vehicle continued north after the impact and stopped 56 feet from the point
16 of impact with its rear wheels in the marked east west crosswalk on Cornwall Avenue.
- 17 20. The lay witnesses to this collision placed the speed of the Alvarado vehicle from just
18 above 20 miles per hour to double the speed limit and with estimates in between 25 miles
19 per hour to 35 miles per hour. The court finds that the lay witnesses' estimates of the
20 speed of the Alvarado vehicle are not particularly reliable.
- 21 21. The expert testimony offered by Officer Leake and Mr. Moebes placed the pre-impact
22 speed of the Alvarado vehicle at a range of 24 to 33 miles per hour.
- 23 22. The court believes that the most accurate estimate of pre-impact speed of the Alvarado
24 vehicle is gained by comparing crush analysis used by Mr. Moebes with ranges available
25 using the Searle formula to calculate speed based on a pedestrian throw distance of 15 to
26 22 feet.
- 27 23. The Court finds that Ms. Alvarado was driving her car at approximately 25 miles per
28 hour at the time she ran into Ms. Bron's vehicle.
- 29 24. During the entire drive time from leaving the Bellingham High School parking lot to the
30 point of impact, Ms. Alvarado never saw the Bron vehicle until after the collision.
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- 1 25. The evidence presented as well as the view of the scene conducted by the Court
2 demonstrates that the intersection of Virginia Street and Cornwall Avenue, where the
3 collision took place, is clearly visible from at least a full block away at the intersection of
4 Kentucky Street and Cornwall Avenue. This intersection is also partially visible from the
5 point where Ms. Alvarado entered Cornwall Avenue from the Bellingham High School
6 parking lot.
- 7 26. The flashing yellow light on Cornwall Avenue alerting drivers to the 20 mile per hour
8 school zone is located 210 feet south from the point of impact of the two vehicles
9 involved in this collision.
- 10 27. Any driver headed north on Cornwall Avenue at the intersection of Kentucky Street and
11 Cornwall Avenue, could have or should have seen any vehicle located at least 400 feet
12 ahead of him or her at the location of the collision.
- 13 28. Traveling at a speed of 25 miles per hour, Ms Alvarado would have been travelling at
14 36.66 feet per second. At a distance of 400 feet, roughly the vicinity of the intersection of
15 Kentucky Street and Cornwall Avenue, Ms. Alvarado would have had 10.9 seconds to
16 see a car located a the point of impact of the two vehicles involved in this collision.
- 17 29. At 300 feet from the point of impact, travelling at 25 miles per hour, Ms. Alvarado
18 would have had 8.2 seconds to see a car located at the point of impact of the two vehicles
19 involved in this collision.
- 20 30. At 210 feet from the point of impact, the location of the flashing speed zone light, Ms.
21 Alvarado would have had 5.7 seconds to see a car located at the point of impact of the
22 two vehicles involved in this collision.
- 23 31. If Ms. Alvarado had been travelling at the 20 mile per hour speed limit at the location of
24 the flashing speed zone light, 210 feet before the point of impact, she would have had
25 greater than 5.7 seconds to see a car located at the point of impact of the two vehicles
26 involved in this collision.
- 27 32. Ms. Alvarado's eyes were not on the roadway in front of her for the last two to four
28 seconds prior to the collision, while she was looking at the backpack on her passenger's
29 lap. In addition, she was not paying sufficient attention to the roadway well before this
30 time frame to see a car located at the point of impact of the two vehicles involved in this
31 collision.
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1 33. Any distraction that may have occurred in this case was not caused by either passenger
2 nor by an outside event.
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4 Based on the foregoing Findings of Fact, the Court hereby enters the following

5
6 **Conclusions of Law**

7 1. The State of Washington has proven beyond a reasonable doubt the following elements:

- 8 a. That on September 30th, 2010, the Respondent Carli Alvarado drove a motor
9 vehicle;
10 b. That the Respondent's driving proximately caused injury to another person;
11 c. That at the time of causing the injury, the Respondent was driving a motor vehicle
12 with disregard for the safety of others;
13 d. That the injured person, Anna Brulotte, died as a proximate result of the injuries;
14 and
15 e. That the Respondent's act occurred in the State of Washington.

16 2. The Court concludes that the Respondent, Carli Alvarado, is guilty of the crime of
17 Vehicular Homicide.
18

19
20 Done in open Court this 29th day of July, 2011.
21

22
23 
24 Commissioner Alfred Heydrich
25

26 Presented by:

27 
28 David S. McEachran
29 Prosecuting Attorney
30 Wash. Bar # 2496
31
32
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1 Copy Received and Presentment Waived:

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3 Jeffrey A. Lustick
4 Attorney for Respondent
5 Wash. Bar # 27072

6 

7 Mark A. Kaiman
8 Attorney for Respondent
9 Wash. Bar# 31049.

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