

74156-0

FILED
June 30, 2016
Court of Appeals
Division I
State of Washington

74156-0

COURT OF APPEALS NO. 74156-0-I

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

STATE OF WASHINGTON,

Respondent,

V.

IRA BLACKSTOCK, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

OPENING BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Respondent

NIELSEN, BROMAN & KOCH
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Trial Testimony</u>	3
C. <u>ARGUMENT</u>	29
1. DEFENSE COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION CLARIFYING "DISREGARD FOR THE SAFETY OF OTHERS" REQUIRES THE STATE TO PROVE CRIMINAL NEGLIGENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.	29
2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.	45
D. <u>CONCLUSION</u>	47

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Hubert,</u> 138 Wn. App. 924, 158 P.3d 1282 (2007).....	30
<u>State v. Eike,</u> 72 Wn.2d 760, 435 P.2d 680 (1967).....	40-43
<u>State v. Gamble,</u> 154 Wn.2d 457, 114 P.3d 646 (2005).....	38
<u>State v. Jacobson,</u> 78 Wn.2d 491, 477 P.2d 1 (1970).....	34-35, 42-43
<u>State v. Nolan,</u> 141 Wn.2d 620, 8 P.3d 300 (2000).....	46
<u>State v. Partridge,</u> 47 Wn.2d 640, 289 P.2d 702 (1956).....	32-34, 41
<u>State v. Peters,</u> 163 Wn. App. 836, 262 P.3d 199 (2011).....	38
<u>State v. Powell,</u> 150 Wn. App. 139, 206 P.3d 703 (2009).....	30
<u>State v. Sinclair,</u> 192 Wn. App. 380, 367 P.3d 612 (2016).....	46-47
<u>State v. Smith,</u> 31 Wn. App. 226, 640 P.2d 25 (1982).....	39
<u>State v. Stevick,</u> 23 Wn.2d 420, 161 P.2d 181 (1945).....	34

TABLE OF AUTHORITIES

Page

WASHINGTON CASES (CONT.)

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987)..... 29

FEDERAL CASES

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984) 29

RULES, STATUTES AND OTHERS

12 A.L.R. 580 (1950)..... 34

Const. art. I, § 22..... 1, 29

Former RCW 46.56.040 32

Laws of 1937, chapter 189, § 120..... 33

RAP 15.2(f) 45

RAP 10.73.160(1) 46

RCW 9A.08.010 38

RCW 9A.32.070 37

TABLE OF AUTHORITIES

	Page
<u>RULES, STATUTES AND OTHERS</u>	
RCW 46.61.502.....	30-31
RCW 46.61.520.....	30, 41
RCW 46.61.522.....	31
Sixth Amendment.....	1, 29
WPIC 90.05.....	32
 <u>OTHER JURISDICTIONS</u>	
31 California Law Review 215.....	35
Former ORS 163.090.....	35
ORS 161.010	36-37
<u>State v. Beckman</u> , 219 Ind. 176, 37 N.E.2d 531 84 (1941).....	36
<u>State v. Woyahn</u> , 204 Or. 84, 282 P.2d 675 (1955)	35-37, 42

A. ASSIGNMENT OF ERROR

Appellant was denied his Sixth Amendment and article 1, § 22 right to effective assistance of counsel.

Issue Pertaining to Assignment of Error

Did appellant receive ineffective assistance of counsel where his attorney failed to request an instruction supported by the case law that would have clarified that in order to convict appellant of vehicular homicide and/or assault, jurors must find appellant failed to be aware of a substantial risk that a wrongful act may occur, i.e. homicide or substantial bodily injury, and that appellant's conduct constituted a gross deviation from the standard of care a reasonable person would exercise?

B. STATEMENT OF THE CASE

1. Procedural Facts

On November 6, 2013, the Skagit county prosecutor charged appellant Ira Blackstock with one count of vehicular homicide and two counts of vehicular assault. CP 85-86. The state alleged that on October 31, 2013, Blackstock drove recklessly or with disregard for the safety of others, lost control of his vehicle and accidentally caused the death of Janeah Goheen and caused substantial bodily harm to Alysha Pickler and Janesah Goheen. CP 85-86, 10-20,

119-20. Sadly, Janesah died several days later and the state amended the charge to vehicular homicide. CP 120.

The defense theory was that Blackstock took reasonable precautions to avoid the accident by letting off the accelerator pedal immediately after he began to lose control. RP 178, 181-82, 848. By doing so, a reasonable person would have expected to regain control of the vehicle. RP 706-08, 847.

Unfortunately, however, due to the calibration specifications of Blackstock's Ford Mustang, the vehicle remained at full throttle and did not slow down. RP 472, 566, 787, 847. The manufacturers at Ford calibrated the throttle such that any continued pressure above 50% (give or take) on the accelerator pedal kept the throttle open at 100%. RP 470-72, 850. A defense expert testified this was unusual in that a vehicle's throttle typically is more evenly paired with the vehicle's accelerator pedal. RP 795. Consequently, the defense contended the accident happened while Blackstock's vehicle was essentially operating on its own. RP 848.

Although the jury convicted Blackstock (CP 125-27), it specifically found he did not drive in a reckless manner. CP 121-23. Blackstock had zero offender points apart from his other current convictions, and his standard range was 36-48 months. CP

72-82. The court sentenced him to the top of the range. CP 72-82.

This appeal follows. CP 92-103.

2. Trial Testimony

At around 5:00 p.m. on October 31, 2013, Pickler, Janesah and Janeah¹ were heading north on SR 20 on their way to Seattle from Oak Harbor. RP 77-79. Janesah was driving a 1993 4-door Acura, with Janeah seated behind her and Pickler in the front passenger seat. RP 78. As they neared the intersection of Miller Road to the west and Gibraltar Road to the east, a 2006 black convertible Mustang traveling south veered into their lane and struck the Acura on the driver's side with its right front passenger side, causing significant lateral damage to the Acura. RP 89, 251, 487.

The Acura spun off and landed in the ditch on the east side of the road, while the Mustang came to rest in a retention pond, approximately 100 feet to the south, also on the east side of the road. RP 248, 296, 315, 409.

Janeah died instantly and Janesah died 11 days later at the hospital. RP 81, 267-71, 287. Pickler suffered a concussion,

¹ Because Janesah and Janeah have the same last name, this brief will refer to them by their first names to avoid confusion. Other witnesses with the same last name will also be referred to by their first. No disrespect is intended.

broken bones and cuts. RP 81-83, 86. Blackstock, who was driving the Mustang, broke his leg. RP 237.

Dale Greenwood was some distance behind the Mustang before the collision. Greenwood first noticed the Mustang in his rear view mirror as he was driving west on SR 20, just before Sharpes Corner. RP 196, 205. The next time Greenwood noticed the Mustang, it drove around him and entered the left turn lane at Sharpes Corner to turn south onto SR 20. As Greenwood testified, "It wasn't anything really unusual." RP 197.

Greenwood testified he could hear the engine rev at the stoplight before they both turned left. RP 197. According to Greenwood, the Mustang moved through the intersection fairly rapidly and seemed to close the gap between it and the next car quickly. RP 197. Greenwood lost sight of the car near Fern Hill cemetery. RP 198.

As Greenwood described, it's an uphill grade leaving from Sharpes corner. The lanes are wide and there is a wide shoulder for semi trucks to pull over on the right (west) side. RP 199. At the crest of the hill where SR 20 intersects with Miller Road and Gibraltar Road, the road curves to the right. RP 199. Greenwood

testified a motorist cannot see around the curve until the motorist is in the actual curve itself. RP 199.

When Greenwood came up over the hill, he entered a cloud of smoke and observed the aftermath of the collision. RP 202. Greenwood pulled over and went to the Acura. RP 203. As indicated, the back seat passenger (Janeah) was dead. RP 203. The driver (Janesah) was immobile but breathing. RP 203. The front passenger (Pickler) was moving, but confused. Greenwood helped Pickler out of the Acura. RP 203.

Mike Shea was also travelling south on SR 20 just before the accident. He didn't notice anything unusual until he reached the top of the hill. RP 209. As he was about to turn onto Gibraltar Road he looked in his rearview mirror and noticed a vehicle following closely. RP 209. Shea signaled to indicate his intent to slow down and turn onto Gibraltar. RP 211. Shea testified that when he activated his blinker, the vehicle behind him immediately started to pass (before Shea got into the turn lane). RP 212. Shea testified he could hear the car's engine and that "there was a definite speed difference between myself and him." RP 213. Shea was going 45 mph. RP 212. Shea could not say whether the vehicle crossed over the fog line in order to pass him. RP 228.

According to Shea, the tires on the vehicle started spinning after it passed him; the pavement was "somewhat wet" so there was no smoke, but Shea could tell the tires were spinning. RP 213. Shea testified the car continued sliding with its back end out to the left in its own lane. RP 214. After 100 yards, the vehicle began fishtailing. RP 215. Shea described a mild fishtail that became more violent; Shea thought the vehicle was going to veer off into the field on the right side. RP 215. But "[t]hen something must have caught, and he went from going right to going left really fast." RP 215. Shea saw the vehicle go "straight across the road" and strike the other vehicle. RP 215.

Brian Cantrell also witnessed the accident. RP 236. He testified that when he reached the curve at the top of the hill, he saw a black car go across the road and hit an oncoming vehicle. RP 235. He testified it looked like a bomb went off; "vehicles flying everywhere." RP 236. When Cantrell saw the black car hit the water, he feared somebody might drown. RP 236.

Cantrell waded out into the water and approached Blackstock who was sitting in the driver's seat. RP 236. When Cantrell asked if he was okay, Blackstock reportedly said: "I'm fucked, I'm fucked" and "are the people okay?" RP 237. Cantrell

said he didn't know and helped Blackstock out of the vehicle. RP 237.

Sean Morley was driving north on SR 20 at the time of the accident. His mother was driving in front of him. RP 292. Morley testified he heard an engine rev and saw a black Mustang take what he characterized as a "sharp overcorrection into another vehicle, and they collided." RP 293. RP 294.

According to Morley, the two cars "stuck together, like a V, and just spun around, and then eventually disconnected[.]" RP 296. The Acura went off the side of the road into the ditch, and the Mustang came further south beyond Morley. RP 296. Morley responded to the driver of the Mustang and asked if he was okay; Blackstock said he was fine and asked how the others were. RP 300.

Roberta Morley (Sean's mom) was driving behind the Acura north on SR 20. RP 302-303. Roberta testified she saw an oncoming car approaching rapidly before making a 90-degree turn and striking the car in front of her. RP 306. According to Morley, the car in front of her "was flipping with it" and both vehicles went over her right. RP 306.

Various police agencies responded and spoke to witnesses. RP 406. One witness said there had been another car travelling south in front of the Mustang that turned right onto Miller Road. RP 331, 333, 342-33.

Paramedics took Pickler, Janesah and Blackstock to the hospital. RP 316. Trooper Jesse Greene went to the hospital and spoke to Blackstock. RP 410, 412. Blackstock was on a backboard and fitted in a C-collar. RP 413.

Blackstock said he was on his way home from work when the accident happened. RP 413. He made no stops and had nothing to drink. RP 413. When asked how the accident happened, Blackstock said there were two vehicles in front of him, one turned left onto Gibraltar and the other turned right onto Miller. Blackstock continued through the vehicles, lost control, drove into the oncoming lane and struck the Acura. RP 414. He said he was driving 55 mph, maybe more. RP 414.

Greene performed field sobriety tests and obtained a warrant for a blood draw. RP 415-16. The toxicology results for Blackstock's blood were negative for alcohol and drugs. RP 661-62.

As part of the investigation, police towed the Mustang to the police yard. RP 92, 353. Detective Edward Collins analyzed the data from the Mustang's power train control module (PCM). RP 101. Although the module itself was damaged, police (with help from the manufacturer) were able to extract its memory chip and install it into a new PCM and download the data. RP 94-95, 128, 344.

As Collins explained, the PCM is located in the engine compartment and monitors various operations, such as air bags, speed, throttle and braking. RP 90. It continuously records for a period of 25.4 seconds before looping and recording over itself. RP 25.4.

Two events will cause the PCM to stop recording and preserve the data relating to the last 25.4 seconds of the car's operation: a signal the air bags have been deployed; or loss of power. RP 108. Collins explained the airbag module decides when to deploy the airbags. When it does so, it will send a signal to the PCM. RP 102. Although the air bags likely deployed in this case, the PCM did not receive a signal due to power loss. RP 102. The data was saved due to the power loss. RP 108. However, when recording stops due to power loss – as opposed to when an airbag

signal is received – the PCM does not re-order the data in the sequence that it occurred in time. RP 109, 157.

Collins therefore was tasked with the job of ordering the data. To do so, he looked for an anomaly indicative of the collision.

RP 110. As Collins testified:

And in this situation it's really easy to see the anomaly. It's real easy to see all this data change right here. And so this data belongs before the crash, and that's how I reordered it in my report.

RP 109.

The PCM records every .2 seconds. Collins assigned “points” to each .2 seconds and made a graph in which the points were ordered in the correct time sequence. RP 111, 118; Ex 132. Collins assigned a “0” to the collision and ordered the data – including speed (red line), accelerator pedal (purple line) and throttle (blue line) – going back 25 seconds from “0.” RP 112.

Collins testified the graph showed speed increase at about 10 seconds back from “0.” The graph showed the accelerator pedal pushed down and the throttle opening up at the same time. RP 113. The angle of the red line (speed) indicated uniform acceleration up until its peak. RP 113. According to Collins, speed started at 55 miles per hour (mph) and peaked at 85 mph. RP 113.

The data showed that once it hit 85, it jumped sharply to 88 (in .2 seconds). Because such a spike is physically impossible, however, it indicated the vehicle was starting to lose control. RP 114.

Collins explained that vehicle speed is actually measured by the transmission's "output shaft speed" or essentially how fast the tires are turning. RP 114. A sensor on the back of the transmission sends the data to the PCM, which converts it to a speed. Accordingly, if the tires are spinning, the PCM is going to log a speed that is higher than the vehicle is actually going. RP 114.

Collins testified that once speed registered at 85 mph, it began to fluctuate: "it goes lower, then it goes higher and then lower, higher, lower, higher, and then it starts coming down." RP 115. To Collins, the data was indicative of a "vehicle out of control, spinning its tires, possibly fishtailing back and forth."² RP 115.

At some point between 7 seconds and the end, the data indicated "the accelerator pedal goes down to zero, so he's not touching the accelerator pedal and the throttle comes down with it, lagging behind a little bit." RP 116. Collins acknowledged an earlier point where the accelerator pedal went down from 88% to

70%.³ RP 116. In the final three or four .2 second-increments, speed registered at 47 mph. RP 123.

Using a different exhibit (Ex 136), Collins testified about “calculated acceleration” over the 7.2 seconds before the collision. RP 120. The chart showed steady acceleration until it jumped from .23 up to .68. That’s the point at which Collins opined the vehicle started losing control. RP 121. After that, the chart showed erratic accelerations, which Collins opined indicated of fishtailing. RP 121. As Collins explained, “[I]f it’s spun out to the right, it would give a certain, you know, acceleration; as it’s spinning back, it could give a negative acceleration.” RP 121.

The chart showed that following the positive and negative accelerations, there was a sustained “negative point six eight.” RP 122. According to Collins, this is when the collision occurred:

We know that, you know, the way the vehicles hit, the Mustang was broadsided at that point in time, and that is a number that we would expect with a broadside slide on wet asphalt. That point six eight is a number exactly like we would expect.

RP 122.

² Collins also referred to fishtailing as being in a “yaw.” RP 193. A “yaw” is when the vehicle starts to rotate around its center. RP 744.

³ On cross examination, Collins testified pressure actually was released to 69%. RP 179.

Collins opined the Mustang was in control at 55 mph. At approximately 10.5 seconds back, however, the accelerator was pushed down, the throttle went up to 100% and the Mustang accelerated from 55 to 85 mph. In Collins' opinion, the driver lost control at that point and began fishtailing. RP 123. Although there were no marks, the roadway was wet. RP 124. At the time of the calculated acceleration of "point six eight, point six eight for three separate samples before impact," the vehicle was "broadside sliding." RP 124. As Collins testified: "And we know that that is how the vehicles contacted each other[.]" RP 124.

On cross, Collins acknowledged Carfax indicated the Mustang had been in two accidents before Blackstock owned it. RP 132. He also acknowledged 118 complaints about the 2006 Ford Mustang had been reported to the National Highway Transportation Safety Administration, many to do with the gas pedal/throttle response. RP 92, 137-156.

Among them was the following:

Sixty-four thousand miles, the gas pedal throttle response symptoms I'm experiencing are significant – lag occurs when pressing down upon the pedal. When pressing down, the gas pedal moves about one inch, and then the electronic fuel system reacts, and the car then jumps, accelerates much too rapidly to a significantly higher RPM than any initial

start-from-stop reaction should be. Even more concerning are the hundreds of online forum reports referencing runaway Mustang throttle pedals sticking while at speed or accelerating with total loss of control of the Mustang's systems until vehicles are actually turned off. These conditions I believe represent true safety issues with the design of Ford Mustangs from 2006 on, where the electronic pedal system was utilized.

RP 138-39.

Numerous complaints described incidents of unintended acceleration. RP 141-52, 156. For instance:

This happened before about a year ago. The car accelerates on its own. I can take my foot off the gas and it goes by itself. No cruise, is not broken or on. That was test. RPM then jumped to about four thousand. This is a serious safety issue. Ford needs to take care of before someone gets killed.

RP 142-43.

Collins also acknowledged that in the instant case, the accelerator pedal and throttle appeared to have a one-to-one ratio up until the accelerator pedal was pushed down to about 50%, at which point the throttle opened up 100%. RP 174-76. He also acknowledged that when the accelerator pedal was released from 88% to 69%, the throttle remained at 100% and did not start closing until the pedal was released to 23%. RP 178. Collins testified the vehicle was still in control when the gas pedal was released to

69%. RP 181-82. It was still accelerating uniformly at that point.
RP 182.

Accident consultant David Temple conducts "vehicle autopsies." RP 361. He inspected the Mustang and testified the brakes appeared to work and the throttle operated smoothly. RP 380. To test the throttle, Temple opened and closed it with his finger. RP 382, 396. He did not test it with an electrical current. RP 382. Nor did he test the correlation between the accelerator pedal and the opening of the throttle. RP 399.

According to Temple, the tires had zero tread depth on one side and $1/32^{\text{nd}}$ of an inch on the other. RP 388. Temple testified the minimum required by statute is $2/32^{\text{nd}}$ of an inch. RP 388. Less tread means less traction. RP 389. Temple testified that having no traction could cause tires to spin and the car to fishtail. RP 390. The possibility is worse if the pavement is wet. RP 390.

A trooper measured the tread depth differently than Temple, however. He testified the tread depth of both front tires was $5/32^{\text{nd}}$ of an inch; the left rear tire was $0/32^{\text{nd}}$ of an inch; and the right rear tire was $1/32^{\text{nd}}$. RP 356-57.

Accident reconstruction consultant Richard Ruth worked for the Ford Motor Company for many years and testified he

specialized in event data recorders like the Mustang's PCM. RP 431-34.

Like Collins, Ruth testified the PCM does not record the actual speed of the vehicle. RP 440. Rather:

What we have is a sensor on the transmission output shaft, it's measuring how fast the drive shaft is turning, and if you know what the axle ratio is and how big the tire is, you can calculate the speed.

RP 440.

Ruth reviewed the data from the Mustang's PCM. RP 452. Like Collins, Ruth examined the data to determine when the crash must have happened. RP 458. He then arranged the data on a graph (Ex 169) so that the last data point on the far right edge of the graph was the last data point before the crash. RP 462. Instead of labeling "data point numbers" on the bottom of the graph, Ruth labeled the data in terms of seconds until the crash. RP 462.

Examining the 25 seconds of data, Ruth testified the driver accelerated slowly and steadily between 25 and 10 seconds before the crash. RP 463. Ruth testified the driver gradually increased speed from 50 to 55 mph. According to Ruth, "[t]hen we see the speed increasing rapidly, and we see a little anomaly, and then we see speed going down." RP 463.

As Ruth testified, between 25 and 10 seconds before the crash, the accelerator pedal was between 15 and 20%. Such pressure typically would maintain speed or slightly increase it, depending on how “peppy” the car. RP 463.

Ruth testified that at just before 10 seconds before the crash, the accelerator pedal position went up rapidly to over 80% and speed increased. RP 464.

Looking at the last 4 seconds of the graph, Ruth noted there was “a little bump in it” at approximately 3.6 seconds before the impact. RP 466. Ruth testified that according to the laws of physics, cars cannot accelerate so fast. RP 466. Ruth explained it led him to believe the tires had broken loose from the roadway and begun to spin, which normally causes the beginning of a loss of control. RP 466.

Thereafter, the graph showed “the speed seem to kind of go down, and sort of come back up, and go down, and say then kind of level out, and then go down, and then come back up.” RP 466. To Ruth, the fluctuation was indicative of fishtailing. RP 467.

Ruth opined speed would appear to drop because when a car goes sideways, the tires “scrub” and are not moving freely or at

all. RP 464-65, 467. Ruth claimed there is a mathematical formula for determining speed in such circumstances:

Now, it turns out that we've done extensive testing on cars going sideways with data recorders. We know that when you're going straight ahead it accurately reports the speed. We know that when you're perfectly sideways it will say that the tires are stopped, that they're just scrubbing sideways. Between straight ahead and stop, it follows kind of a nice mathematical function. It reports the speed proportional to the cosine of the angle that the car is slipping sideways at.

RP 468.

According to Ruth's calculations, the last time the Mustang was straight, it was going 77 mph. RP 468. And according to Ruth, the speed at impact was 66 mph, not 47:

We expect this red line to be the true speed times the cosine that the – of the angle that the car is slipping sideways at, and eventually when we get to impact, it's slipping sideways at about 45 degrees. Cosine of 45 is about zero point seven, so the car is actually doing somewhere up here in the neighborhood of, say, approximately 66 miles an hour, but it's not going to say 66, because the tires are skidding sideways, it's going to report 47.

RP 469.

Looking at Collins' graph (Ex 132) and the throttle angle data, Ruth noted that the accelerator pedal position and throttle were almost the same at about 18% for the first 15 seconds before

the crash. RP 470. But he claimed the pedal position and throttle will deviate once the accelerator pedal is at 50%; at that point, the throttle opens up all the way. RP 470-71. Ruth testified Mustangs are built that way on purpose to make them “peppy.” RP 470. The same deviation occurs during deceleration. Even if the accelerator pedal dips down to 70%, the throttle will remain open at 100%. RP 472.

Thus, when the accelerator pedal of the Mustang dipped to 68% in the instant case, Ford still interpreted that as the driver wanting to go faster. RP 472. In layman’s terms, anything above 50% means the driver wants to go faster.⁴ RP 472. As Ruth testified, there is also a lag between the accelerator pedal and the throttle so the car doesn’t feel “too jerky.” RP 472. In this case, the throttle did not start to close until the accelerator pedal was released to 23%. RP 566.

According to Ruth, the Mustang reached a top speed of 85 mph. RP 473. Although the PCM indicated the Mustang was going 47 mph at impact, Ruth testified it was 66 mph, based on his cosine calculation. RP 474.

⁴ On cross, Ruth admitted he was assuming what Ford intended and did not know Ford’s actual calibration. RP 559.

In Ruth's opinion, the PCM showed the Mustang's tires breaking loose at 380 feet to impact. RP 502. He speculated possible causes could have included: (1) slight avoidance due to the curve of the road; (2) potentially avoiding a turning car; (3) wet roadway; (4) nearly bald tires; and (5) pushing down the accelerator pedal to the point the throttle opened up 100%. RP 502-03.

Ruth opined the Mustang rotated counter clockwise so that its passenger front corner dug into the side of the Acura and spun off, never fully engaging in "common velocity," where cars involved in an accident stick together for a bit. RP 489.

Ruth's opinion was based solely on the PCM, which he claimed is a stand-alone tool for accident reconstruction. RP 503-04.

Defense expert and forensic engineer Robin Brown disagreed with Ruth's analysis. First of all, the company (Bosch) that developed the software to retrieve the PCM data never intended it to be a stand-alone tool, because as soon as the tires start to spin, the data becomes unreliable. RP 780. Therefore, in addition to analyzing the PCM data, Brown inspected both vehicles as well as the accident scene and reviewed over 500 pages of police reports. RP 747-48.

Regarding the scene, Brown noted the curve at the crest of the hill is slightly inclined, i.e. one side of the curve is higher than the other. RP 749. Therefore, nothing at the scene would create water pooling on the road surface. RP 748.

Regarding the tires on the Mustang, Brown testified they still had some tread. RP 799. However, the fact that they were nearly bald would not have contributed to the accident, as there was no water pooling on the road. RP 800.

Regarding the damage to the vehicles, Brown testified it was not as severe as it seemed. Examining the damage to the Mustang, Brown noted the bulk of the impact was lateral, with the front bumper torn off. RP 749. As he described, "this was a force on the Mustang that was primarily impact force right to left, not front to back." RP 750. Brown testified "this vehicle is not designed to take that at all, so the fact that the front bumper was torn off, well, that's a plastic cover, that's not that important[.]" RP 750.

Regarding the Acura, the damage started at the left side of the firewall or cowl, the separation between the occupant compartment and the engine. Unfortunately, the force was directed into the occupant compartment. RP 751. Brown testified such

"[c]ouldn't be a worse part on the vehicle" because there's no impact protection, no structural strength. RP 751.

Brown testified that limited energy is required to cause damage resulting from a lateral impact:

[J]ust imagine a corner of that Mustang hitting the side surfaces and moving down the side. What does that do? It creates – it creates some instruction [sic], which was clearly evident. But more importantly, it's tearing the side surfaces off, because they're not designed to absorb energy. You've got some door skins that are attached to a door frame. They will be peeled off with very, very limited energy required.

RP 753.

Similarly, the debris field at the scene was indicative of the way the vehicles moved past one another, not of high velocity. RP 754.

Regarding the Mustang's PCM data, Brown testified the maximum, recorded speed of 88 mph followed by deceleration to a recorded speed of 47 mph did not comport with the laws of physics. RP 755. Most specifically, it was not physically possible to go from a speed of 77 to 47 in the time frame indicated:

The most obvious point that makes – defies all laws of physics is, from here to here, so this is about 77 – 77 to 47 miles per hour. In the time span, which would be the bottom axis, we can calculate what the deceleration rate is. I've already done that, and the

deceleration rate is a value of zero point eight five G. G is gravitational constant.

So what you have to know is, this occurred on a wet road. The coefficient of friction is measured as a function of the gravitational constant, would probably be a value of about zero point five five. It would not, even with locked – so with locked brakes, vehicles completely sliding could only generate point five five. This output shows zero point eight five. It's impossible.

RP 756.

As Brown noted, the frictional coefficient of the road was never measured. RP 756. However, the value he used “zero point five five” is “pretty widely accepted” by publications studying different coefficients of friction that would develop on a wet road surface. RP 757.

Looking at the recorded impact speed of 47 and working backwards, Brown explained how he calculated the Mustang's speed at the time it lost control:

Q [defense counsel]. In this particular instance, using 47 miles per hour, and a frictional coefficient of I think it's point five five G, are you able to determine – the PCM shows a speed at – the speed that was generated at the time of loss of control as 85 miles per hour. Using 47 miles per hour frictional coefficient of the roadway, are you able to calculate a speed using sort of a traditional – using basically math to come up with a number?

A. Yes. I'm able to back calculate and determine that using a deceleration rates that are

possible, as the speed – the speed at the loss of control would have been, I believe, in the 62-67 miles an hour.

Q. And does that take into consideration the yawing or rotation of the automobile?

A. Yes, it does.

RP 762-63.

As Brown noted, Ruth also addressed the implausibility of going from 77 mph to 47 mph. Whereas Ruth calculated a higher impact speed as a result, Brown calculated a lower *top* speed as a result. RP 766. Brown did not agree with Ruth's methodology.

First of all, to go from 85 to 66 mph at the time of impact required a frictional coefficient Brown did not agree with. RP 767. Moreover, Brown disagreed with Ruth's cosine calculation because it did not pair with what witnesses saw:

[T]he vehicle rotates out to a certain position to get to a certain angle, and he takes a cosine of that angle and multiplies it by the coefficient of friction and says that's what was rubbing off. But you would have to believe that the vehicle swung out and then stayed there and then just slid up the road, never moving from that angle. And that – not possible.

. . . the discovery that I read the vehicle was observed to fishtail back and forth, and therein lies the different analysis[.]

RP 834.

Second, Ruth's calculation did not take into account the collision severity or location of the vehicles when they came to rest. RP 766-67. At the speed calculated by Ruth, Brown would have expected to see *more* vehicle damage:

It's more of an oblique collision, with probably no common velocity attained, but it's the nature of the contact on these cars. And as you increase those speeds, you're going to increase those shearing forces, because there's still engagement.

And the nature of the contact with the big shear across the front of the Mustang, the lateral force, you could potentially see the front end literally separated – the subframe will separate underneath the firewall, and you will – it's not uncommon to see an engine and a front end detached from the vehicle.

Similarly on the Acura, we've got – it's not a great couple, like where they actually engage, but you can see that it went into the car to produce that kind of deformation. At the speeds Ruth is suggesting, that would be greater, to the extent that the entire occupant compartment could have been seriously compromised[.]

RP 772.

At the impact speed calculated by Ruth, Brown would have expected the Mustang to be 200-300 feet from the collision site, not 100 feet. RP 767. With Ruth's calculation, "too much speed is rubbed off in too short of a period of time." RP 767. Brown believed the recorded impact speed of 47 was more realistic and in line with the physical evidence. RP 789.

Although Brown disagreed with the speed calculated by Ruth, Brown agreed the “sharp uptick” depicted on the graphs was the point of loss of control, where the tires began to spin. RP 788. He testified this happened after approximately 1.2 seconds of acceleration. RP 788.

Rather than high speed causing the loss of control, Brown opined going around the curve – even at a lower speed – could have caused the loss of control:

[I]f you feel a really tight corner, you’re making a right hand curve, you feel you’re being pushed out to the left. Those are lateral acceleration forces. They are easy to calculate. Lateral acceleration is equal to the velocity squared, so the speed squared over the radius of curvature.

So a slight increase in speed increases the acceleration forces in a tremendous matter. And that’s what takes you to the edge. You can go around that curve at 40 miles an hour, at 50 miles an hour you might have exceeded the available friction because the lateral forces are that much greater going around the curve, so that increase in speed is what created the loss of control.

Had the vehicle, as I said, not accelerated any – beyond that point? That’s – that’s at the margin of safety.

RP 790.

Brown believed the accelerator pedal and its operation with the throttle contributed to the vehicle’s loss of control. RP 786-87.

[T]he accelerator pedal and throttle, if the throttle was to follow the accelerator, i.e., that the driver has released it, and it had started to low, even modestly, he has tremendous much larger margin. So in my opinion, had it – had the throttle moved in concert with the accelerator pedal, loss of control doesn't happen.

R 790.

Unfortunately, however, at the time when the pedal was released from 88 to 68%, which Brown characterized as a "substantial release," the throttle remained at 100%. RP 787. It did not begin to close until the accelerator pedal was down to 23 ½ or 33%, which Brown characterized as an "extraordinarily low number." RP 788. Brown characterized the circumstances as "a complete disconnect between what the driver is asking for and what the vehicle does." RP 795. To Brown, "it's completely abnormal" and he did not believe "the average motorist would expect this to happen." RP 795.

Indeed, detective Craig Cardinal would not have expected such a result. He applied for several search warrants throughout the investigation of the case. Cardinal acknowledged that in his search warrant application for the PCM, he wrote the driver could have gained control of the vehicle by releasing the accelerator pedal:

Q. [defense counsel] And I think at some point you used language, and I think this would be at page 7 of 8 is how I have it memorialized here, that I think you use language to the effect – and again, this is what you stated to the court, the detective recognized that Mr. Blackstock had opportunity to gain control of his vehicle by letting off the accelerator, since the collision took place a substantial distance past the intersection approximately 350 to 400 feet.

A. Yes.

Q. So in essence what you indicate is, is that by backing off on the accelerator pedal, Mr. Blackstock would have had opportunity to gain control of his vehicle.

A. Yes, that's one of the options you have.

Q. In other words, there's a chain of events that happen when you release pressure on the accelerator pedal, presumptively, when you're filling this out, the thought process going through your mind is, is that releasing pressure on the accelerator pedal will cause the throttle to close somewhat, slowing the speed of the automobile, correct?

A. That's correct.

Q. And that would have allowed him to regain control prior to the point of impact?

A. It would have assisted, yes.

RP 706-08.

B. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION CLARIFYING "DISREGARD FOR THE SAFETY OF OTHERS" REQUIRES THE STATE TO PROVE CRIMINAL NEGLIGENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective when (1) the attorney's performance is deficient and (2) the deficiency prejudices the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226.

Ineffective assistance may lie where defense counsel fails to request an instruction that supports the defense case. See e.g. Thomas, 109 Wn.2d at 227-28 (counsel's failure to request an involuntary intoxication instruction where the evidence supported it constituted ineffective assistance of counsel). "Failure to request an instruction on a potential defense can constitute ineffective

assistance of counsel.” In re Pers. Restraint of Hubert, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007).

To prevail on an ineffective assistance of counsel claim for failure to propose a jury instruction, an appellant must show that (1) had counsel requested the instruction, the trial court likely would have given it, and (2) defense counsel's failure to request the instruction was not a legitimate tactical decision. State v. Powell, 150 Wn. App. 139, 154–55, 206 P.3d 703 (2009). Both prongs are met here.

The vehicular homicide statute provides:

(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.

RCW 46.61.520.

Similarly, the vehicular assault statute provides:

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

(a) In a reckless manner and causes substantial bodily harm to another; or

(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; or

(c) With disregard for the safety of others and causes substantial bodily harm to another.

RCW 46.61.522.

Thus, the state was required to prove Blackstock drove in a reckless manner or “with disregard for the safety of others.” Because the jury expressly found Blackstock did not drive recklessly, it necessarily found he drove with disregard for the safety of others.

“Disregard for the safety of others” is not defined by statute.

The state proposed and the court gave the following definition:

Disregard for the safety of others means an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than ordinary negligence. Ordinary negligence is the failure to exercise ordinary care. Ordinary negligence is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances. Ordinary negligence in operating a motor vehicle does not render a person guilty of vehicular homicide or vehicular assault.

CP 30; Supp. CP ___ (sub. no. 97, State's Proposed Instructions to the Jury, 9/10/15) (WPIC 90.05).

While this instruction is technically correct – that more than ordinary negligence is required – it does not adequately convey that *criminal* negligence is required. Defense counsel was ineffective in failing to request an instruction making this abundantly clear to the jury.

In State v. Partridge, 47 Wn.2d 640, 289 P.2d 702 (1956), the court considered the predecessor to our current vehicular homicide statute, commonly known as the “negligent homicide statute.” Partridge, 47 Wn.2d at 641. It provided:

When the death of a person ensues within one years as a proximate result of injury received by the operation of a vehicle by any person while under the influence of or affected by intoxicating liquor or narcotic drugs or by the operation of any vehicle in a reckless manner or with disregard for the safety of others, the person so operating such vehicle shall be guilty of negligent homicide by means of a motor vehicle.

Former RCW 46.56.040.

The Partidge court noted the statute was enacted to ameliorate difficulty in obtaining convictions under the manslaughter statutes when driving was involved:

The legislature, in chapter 189, Laws of 1937, enacted the Motor Vehicle Act, consisting of one hundred fifty nine sections. Section 120 thereof, the negligent homicide statute, was included at the behest of the prosecutors. They had experienced difficulty in obtaining convictions under the manslaughter statute because juries were loath to attach the onus of "manslaughter" to those causing the death of a person through the operation of an automobile.

Partridge, 47 Wn.2d at 642.

In holding that more than "ordinary negligence" is required to prove the defendant operated a vehicle in a reckless manner, the Partridge court relied on the fact the legislature enacted the statute due to the stigma associated with manslaughter and the difficulty it created in obtaining convictions:

Section 120, chapter 189, Laws of 1937 was a special act passed by the legislature to meet a particular situation.. It set up a new crime – the crime of negligent homicide. The elements of the crime are: death within one year as the result of the operation of a motor vehicle by any person while (1) under the influence of or affected by intoxicating liquor or narcotic drugs, or (2) by the operation of any vehicle in a reckless manner, or (3) with disregard for the safety of others. We do not question that a person operating a vehicle in a reckless manner could also be guilty of negligence, but the gravamen of (2) is operating in a reckless manner. We are satisfied that a finding of ordinary negligence is not sufficient to support a conviction under the act. To operate a motor vehicle in a reckless manner is more than that. Although we do not wish to limit the trial courts in their definition of the term, it is, as Instruction No. 6 in the

Stevick case stated, “the operation of a motor vehicle in a heedless, careless or rash manner or in a manner indifferent to consequences.”

Partridge, 47 Wn.2d at 645 (citing State v. Stevick, 23 Wn.2d 420, 161 P.2d 181, 184 (1945)).

The Partridge court declined to consider the degree of proof required to support a conviction under the charge of “with a disregard for the safety of others” as the issue was not before it. Id.

In State v. Jacobson, 78 Wn.2d 491, 477 P.2d 1 (1970), the court considered whether “with a disregard for the safety of others” is unconstitutionally vague. The court previously had interpreted it “as implying an aggravated kind of negligence, falling short of recklessness, but more serious than ordinary negligence.” Jacobson, 78 Wn.2d at 498.

Based on an Oregon case, the court disagreed it was unconstitutionally vague:

Criminal statutes need not spell out with absolute certainty every act or omission which is prohibited if the general terms of the act convey an understandable meaning to the average person. 12 A.L.R.2d 580 (1950). This especially true where the subject matter, as here, does not admit of precision. We think the terms “disregard for the safety of others” and “reckless manner” adequately convey such meaning. A similar attack was made on Oregon’s negligent homicide statute. After an exhaustive review of the authorities, the attack was rejected.

State v. Woyahn, 204 Or. 84, 282 P.2d 675 (1955).
We are in accord with the view expressed by the
Oregon court on this issue.

Jacobson, 78 Wn.2d at 498.

The negligent homicide statute at issue in Woyahn provided:

When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any motor vehicle in a negligent manner, *** the person driving such vehicle *** is guilty of negligent homicide, and, upon conviction, shall be punished by imprisonment in the county jail for not more than one year, or in the state penitentiary for not more than three years, or by a fine of not to exceed \$2,500, or by both fine and imprisonment.

Woyahn, 204 Or. at 86 (citing former ORS 163.090).

In considering whether the statute was unconstitutionally vague, the court noted Oregon had other criminal statutes, notably manslaughter, which authorize a determination of an accused's guilt or innocence by applying to his challenged act a criterion of "due care." Woyahn, 204 Or. at 88. The court then noted that negligent homicide is virtually the same offense as manslaughter:

According to a note in 31 California Law Review 215, negligent homicide acts have been enacted "because of the difficulty of getting manslaughter convictions in automobile death cases." Since the criteria employed by the two acts as the means of determining guilty are virtually alike, the jury's reluctance to convict of manslaughter and its response to duty under the negligent homicide act

must come from something other than the criteria which determine guilt.

Giving attention only to the phraseology in which the two measures are cast, we observe that the differences between manslaughter and negligent homicide are (a) the title for the new crime is less grisly in its connotation than that of the old; (b) a lesser penalty is prescribed for negligent homicide than for manslaughter; (c) the test for negligent homicide is "in a negligent manner," whereas manslaughter takes as its test "due caution or circumspection;" (d) the manslaughter act prescribes no period within which death must ensue, but the negligent homicide act fixes as the period one year.

In its administration of the manslaughter act, this court has regarded the term "without due caution or circumspection" as the virtual equivalent of the term "negligence."

Wojahn, 204 Or. at 89.

Not only did the court liken negligent homicide to manslaughter but cited an Indiana case holding that "reckless disregard for the safety of others" has the same meaning as common law manslaughter and therefore is not unconstitutionally vague. Wojahn, 204 Or. at 110-111 (citing State v. Beckman, 219 Ind. 176, 37 N.E.2d 531, 533 (1941)).

The court further noted that in Oregon, the word "negligence" is expressly defined, albeit elsewhere in the criminal code. Wojahn, 205 Or. at 111; ORS 161.010.⁵

⁵ ORS 161.010 says:

Based on these authorities, the court found the negligent homicide statute sufficiently precise to survive constitutional scrutiny:

Since ORS 161.010 defines the term “negligence,” and since the judicial decisions unite in the same definition of it, as well as illustrate its application, we have unusual circumstances which lend clarity to the act’s meaning.

Wojahn, 204 Or. at 139.

As the above authorities make clear, Washington’s vehicular homicide statute, which has its genesis in the old negligent homicide statute, is not unconstitutionally vague because it is essentially the same offense as manslaughter, with a less grisly title to help ensure accountability when someone operates a motor vehicle. Thus, the state must prove the individual drove recklessly or “with disregard for the safety of others,” which is common law manslaughter. Thus, as in the context of manslaughter, the state must prove at least *criminal* negligence. See e.g. 9A.32.070 (A person is guilty of manslaughter in the second degree when, with

As used in the statutes relating to crimes and criminal procedure, unless the context requires otherwise:

(2) “Neglect,” “negligence,” “negligent” and “negligently” import a want of such attention to the nature or probable consequences of the act or omission referred to as a prudent man bestows in acting in his own concerns.”

criminal negligence, he or she causes the death of another person.”).

As in Oregon, Washington law specifically defines criminal negligence:

Under RCW 9A.08.010:

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010. In a manslaughter prosecution, the wrongful act is homicide. State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005); see also State v. Peters, 163 Wn. App. 836, 262 P.3d 199 (2011) (in manslaughter prosecution, “wrongful act” means homicide).

Thus, defense counsel would have been justified in seeking an instruction such as the following for the vehicular homicide counts:

Disregard for the safety of others means failing to be aware of a substantial risk that a homicide may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Similarly, defense counsel would have been justified in seeking an instruction such as the following for the vehicular assault count:

Disregard for the safety of others means failing to be aware of a substantial risk that substantial bodily harm may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Had defense counsel requested these instructions, the trial court likely would have given them. As indicated, they are wholly supported by case law interpreting the original negligent homicide statute. Moreover, the instructions are not created out of whole cloth, they consist of the statutory definition for negligence. See e.g. State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982) (in manslaughter prosecution, trial court did not err in giving instructions containing statutory definitions of “recklessness” and “criminal negligence”).

Moreover, several jurists of our state supreme court have advocated for a more precise definition:

It is my view, in substance, that a minimally acceptable definition and jury instruction would be one which would define ordinary negligence, advise the jury that the state must prove greater than ordinary negligence, and assert that the phrase “disregard for the safety of others” contemplates an

act or omission on the part of the accused which, by its character and the surrounding circumstances, manifests a heedless indifference to the probability that injury to others will flow from such conduct.

State v. Eike, 72 Wn.2d 760, 769, 435 P.2d 680 (1967) (Hamilton, J., concurring in part and dissenting in part) (emphasis added); see also Eike, 72 Wn.2d at 771-72 (Finley, J., dissenting) (equating “disregard for the safety of others” with criminal negligence).

Rather than telling the jury what it can’t convict for – ordinary negligence – the proposed instructions tell the jury what it must find in order to convict. Thus, the proposed instructions provide a much clearer yardstick for jurors to follow in their deliberations. As a result, the court likely would have given such instructions if requested.

In response, the state may cite to the majority opinion in Eike as a basis for concluding the court would not have given the instructions if requested. Such an argument should be rejected.

In Eike, the defense proposed instruction no. 6:

As to the third charge in the information, to operate a motor vehicle with disregard for the safety of others means what the words imply, such a disregard of consequences as to evince or show a willingness to perpetuate injury to another or to take known chances of doing so.

Eike, at 764.

The court refused the instruction and gave its own no. 6:

As to the charge in the Information, to operate a motor vehicle with disregard for the safety of others, means just what the words imply.

Eike, at 764.

On review, the majority held the trial court did not err in giving the instruction it gave, due to the uniqueness of the statute and the lack of other views to guide its interpretation:

Our study of negligent homicide statutes shows RCW 46.61.520 to be unique among the states. Research has disclosed no other statute couched in identical language. This gives the Partridge case an even weightier than ordinary impact for it represents the last definitive statement of this court on the interpretation of a statute which, although dealing with a subject matter common to all states of the Union, is phrased in language peculiar to this jurisdiction. Thus, we have no major or minor views to turn to as an aid in interpretation and, accordingly, think it best to adhere to the Partridge rationale.

As Partridge says, ordinary negligence will not support a conviction of negligent homicide. And if 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.

Accordingly, it was not error for the court, in instruction No. 6 to instruct that "to operate a motor vehicle with disregard for the safety of others, means just what the words imply." But in the absence of a specific request for such an instruction, the court was not obliged to go beyond the language of the statute and declare that to drive with disregard for the safety of others means a negligence greater than ordinary negligence. Defendant not having requested such an instruction to that effect, it was not error to omit such an instruction.

Eike, at 766.

Eike is not controlling for several reasons. First, the instruction proposed in that case required jurors to find "such a disregard of consequences as to evince or show a willingness to perpetrate injury to another or to take known chances of so doing." This is a higher degree of proof than criminal negligence. It requires acts evincing a willingness to perpetrate injury or to take known risks of perpetrating injury. This implies a culpable mental state not present in common law manslaughter.

Eike is also inapposite because it was decided before Jacobson, which relied on Wojahn to reject a vagueness challenge to the negligent homicide statute. As indicated above, Wojahn

upheld its negligent homicide statute on grounds it was essentially the same offense as manslaughter. Accordingly, the instruction proposed here is in keeping with decisions coming after Eike, such as Jacobsen.

Finally, the Eike majority opinion was criticized as failing “to spell out a practical and reasonably descriptive definition of the phrase ‘disregard for the safety of others[.]’” Eike, 72 Wn.2d at 767-779 (Hamilton, J., concurring in part and dissenting in part); see also Eike, 72 Wn.2d at 71 (“The basic defect in the majority opinion, and one I cannot accept and live with in good conscience, lies in its failure to employ, and I may say quite traditionally and appropriately, judicial interpretation and explanation as to the third category posed by the legislature in the statute”) (Finley, J., dissenting).

Thus, not only is Eike not controlling here, but it is poorly reasoned. This Court is not bound by it.

There was no tactical reason for counsel not to request instruction like those proposed here. As indicated, they are legally supported. They also make clear the jury must find the defendant failed to be aware of a “substantial risk” that a homicide or substantial bodily injury may occur and that such failure was a

“gross” deviation from the standard of care a reasonable person would exercise. This is obviously a stricter burden of proof than merely having to show a “more serious dereliction” than ordinary negligence, which literally could be anything. Had the defense instructions such as those proposed here, it would have been more difficult for the state to convict. Defense counsel’s failure to request the instructions fell below an objective standard of reasonableness.

There is a reasonable probability the outcome would have been different had defense counsel requested the proposed instructions. If believed, the state’s evidence showed Blackstock accelerated quickly on a wet roadway with nearly bald tires. Considering the amorphous nature of the more-serious-dereliction-than-ordinary-negligence standard, it likely was easy for the prosecutor to convince the jury Blackstock’s conduct was criminal. However, whether such conduct amounted to failing to be aware of a “substantial risk” a *homicide* or *substantial bodily injury* – the true test for criminal negligence – may occur is an entirely different story. And considering that jurors expressly found Blackstock was not reckless, it is probable they also would find his conduct was not a “gross deviation” from the standard of care a reasonable person

would exercise. Blackstock was prejudiced by his attorney's deficient performance. This Court should reverse his convictions.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

The trial court found Blackstone indigent for purposes of this appeal. CP 104-05. Under RAP 15.2(f), "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."

In his declaration of indigency, Blackstone noted he is married with a 19 year-old child still living at home. Supp. CP ___ (sub. no. 126, Declaration of Indigency, 10/19/15). Blackstone's wife is a full time student. Id. Although the couple owns a home valued at \$180,000.00, they still owe \$50,000.00 on it. Blackstone has credit card debt totaling \$22,000.00 and his wife owes approximately \$20,000.00 in student loans. Id. Apart from some used cars and tools, Blackstone owns nothing of value, besides his home, in which he has a community property interest. He still owes money for his legal representation at trial. Id.

Blackstone was sentenced to nearly five years of incarceration. CP 75. Although restitution had not yet been

established at the time of sentencing, a hearing was scheduled. CP 77. An agreed order has since been entered ordering Blackstone to pay \$10,796.52. Supp. CP ___ (sub. no. 140, Agreed Order of Restitution, 4/27/16).

Blackstone was in his mid-fifties at the time of sentencing. CP 85. The court imposed only the \$500 VPA, \$100 DNA fee and a \$200 criminal filing fee. CP 76-77.

Under RCW 10.73.160(1), appellate courts “*may* require an adult offender convicted of an offense to pay appellate costs.” (Emphasis added). The commissioner or clerk “*will*” award costs to the State if the State is the substantially prevailing party on review, “*unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an

appellant's brief. Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94. Based on Blackstone's indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

D. CONCLUSION

Because Blackstock received ineffective assistance of counsel, this Court should reverse his convictions. Alternatively, this Court should exercise its discretion and deny any request for costs.

Dated this 30th day of June, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT
OF COUNSEL
K. CAROLYN RAMAMURTI

State V. Ira Blackstock

No. 74156-0-I

Certificate of Service

On June 30, 2016, I e-filed, served and or mailed directed to:

Ira Blackstock, Jr. 386381
Monroe Corrections Center
PO Box 777
Monroe, WA 98272

Containing a copy of the opening brief, re Ira Blackstock
Cause No. 74156-0-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



John Sloane
Office Manager
Nielsen, Broman & Koch

06-30-2016
Date
Done in Seattle, Washington