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Court of Appeals
Division I
State of Washington
NO. 74156-0-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

IRA LAMAR BLACKSTOCK, JR.
Appellant.

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

The Honorable Dave Needy, Judge

BRIEF OF RESPONDENT

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I. SUMMARY OF ARGUMENT

Ira Blackstock appeals from his convictions for two counts of Vehicular Homicide and one count of Vehicular Assault all by disregard for safety of others. Blackstock acknowledges that the disregard for safety of others instruction was “technically correct.” But he contends his counsel was ineffective for failing to propose an instruction that made it “abundantly clear” that criminal negligence was required.

Because the instruction given for disregard for safety was correct, and a different instruction was not required, Blackstock cannot establish his attorney’s actions fell below a standard of reasonableness or that he was prejudiced thereby. Thus, his convictions must be affirmed.

II. ISSUES

1. Was the instruction for disregard for safety of others a correct statement of the law?
2. Where the instruction given was “technically correct” according to the Appellant, can the defendant establish the prejudice required to prove ineffective assistance?
3. Where the legislature has had an opportunity to adopt the criminal negligence standard, should this Court adhere to the greater than ordinary negligence instruction previously approved by appellate decisions?

4. Are appellate costs appropriate in light of the defendant's resources and earning potential?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On November 6, 2013, Ira Blackstock was charged with one count of Vehicular Homicide and two counts of Vehicular Assault alleged to have occurred on October 31, 2013. CP 85-6. It was alleged that about 5:00 p.m. on October 31, 2013, Blackstock accelerated his Ford Mustang southbound up a hill on Highway 20, crossed the center line and struck a northbound Acura with three teenage girls, initially seriously injuring the driver and front-seat passenger and killing the twin sister of the driver in the rear seat. CP 2-3. Three civilians driving in the area described that Blackstock's vehicle had accelerated rapidly before the collision and crossed the centerline. CP 4-5. Blackstock was evaluated for intoxication and a blood draw occurred. CP 9.

On November 12, 2013, the information was amended to two counts of Vehicular Homicide and one count of Vehicular Assault because the driver died. CP 19-20, CP 10-11.

On March 13, 2015, a second amended information was filed alleging that the two counts of Vehicular Homicide and one count of

Vehicular Assault were by reckless driving or for disregard of safety of others. CP 119-20.

On September 8, 2015, the case proceeded to trial. 9/8/15 RP 8, 22.¹

On September 18, 2015, the jury returned verdicts finding Blackstock guilty of two counts of Vehicular Homicide and one count of Vehicular Assault but specifying that it was not as a result of reckless driving. CP 121-3, 125-7.

On October 14, 2015, Blackstock was sentenced to 48 months in prison on the two counts of Vehicular Homicide by Disregard for Safety of Others and 16 months on the Vehicular Assault by Disregard for Safety of Others, to run concurrently. CP 75.

On October 19, 2015, Blackstock timely filed a notice of appeal CP 92.

¹ The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The report of proceedings in this case are as follows:

6/3/15 RP	3.5 Hearing (VRP)
8/21/15 RP	Omnibus (VRP 1), in vol. with 9/8/15, 9/9/15
9/8/15 RP	Motions, Questionnaire (VRP 1), in vol. with 8/21/15, 9/9/15
9/9/15 RP	Preliminary Instructions (VRP 1), in vol. with 8/21/15, 9/8/15
9/10/15 RP	Trial Testimony Day 1 (VRP II)
9/11/15 RP	Trial Testimony Day 2 (VRP III)
9/14/16 RP	Trial Testimony Day 3 (VRP IV)
9/15/16 RP	Trial Testimony Day 4 (VRP V)
9/16/16 RP	Trial Testimony Day 5 (VRP VI)
9/17/16 RP	Instructions/Closing (VRP VII) in vol. with 9/18/15, 10/14/15
9/18/15 RP	Verdicts (VRP VII) in vol. with 9/17/15, 10/14/15
10/14/15 RP	Sentencing (VRP VII) in vol. with 9/17/15, 9/18/15.

2. Summary of Trial Testimony

Alysha Pickler, who was twenty years old at the time of trial, testified that she was with Janesah and Janeah Goheen in Oak Harbor on October 31, 2013. 9/10/15 RP 76-8. The friends were headed to Seattle to go to haunted houses advertised by radio stations. 9/10/15 RP 77-8. They left Oak Harbor about 4:30 with Janesah driving the 1993 Acura and Janeah in the back seat behind her sister. 9/10/15 RP 78. Alysha was the front seat passenger. 9/10/15 RP 78. Janesah was a cautious driver. 9/10/15 RP 79.

The last thing that Alysha recalls was driving over the Deception Pass Bridge. 9/10/15 RP 79. The next thing she recalled was waking up in the hospital in Anacortes. 9/10/15 RP 79. Alysha suffered three broken ribs, a broken left elbow, a broken left pinky finger, a cut to her leg requiring nineteen stitches and injuries to her face from striking the windshield. 9/10/15 RP 82-4. Alysha also suffered a concussion that causes delayed brain reaction. 9/10/15 RP 86. The injuries still affected Alysha at the time of trial, nearly two years after the accident. 9/10/15 RP 82-3.

Patrick Lyons was the doctor who treated Alysha Pickler at the hospital. 9/15/15 RP 644, 648. Lyons confirmed the existence of fractures to the elbow, finger and ribs as well as a concussion. 9/15/15 RP 652, 654.

Henry Shea left the a nearby refinery around 5:00 on October 31, 2013. 9/10/15 RP 207. Shea was driving a full-sized truck with a canopy on

the back. 9/10/15 RP 209. Shea recalled going through the stoplight on Highway 20 to turn south. 9/10/15 RP 208. Shea did not notice anything unusual until he approached the top of the hill. 9/10/15 RP 209. The hill has a steep grade. 9/10/15 RP 209. The speed limit is 50 miles per hour in the area of the collision. 9/15/15 RP 699.

Shea looked in his rearview mirror and saw someone following closely. 9/10/15 RP 209. He could not see the license plate of the vehicle which was within ten feet of his. 9/10/15 RP 210. Shea was travelling 50 to 55 miles per hour. 9/10/15 RP 226. Shea immediately signaled when he first saw the vehicle to indicate he was slowing and turning left onto Gibraltar road. 9/10/15 RP 210-1, 228.

As he slowed, Shea immediately heard the engine of the vehicle and saw the vehicle was passing him. 9/10/15 RP 212. The vehicle passed aggressively on the right before the turn lane. 9/10/15 RP 212-3. Shea was going 45 miles per hour at that point. 9/10/15 RP 212. Shea was able to hear the sound of the exhaust or motor for some time after the pass. 9/10/15 RP 213. As Shea was being passed, he could see the vehicle start spinning. 9/10/15 RP 213. The pavement was somewhat wet. 9/10/15 RP 213.

As the vehicle passed him, it drifted out to the left in its lane. 9/10/15 RP 214. The Mustang accelerated rapidly while passing him. 9/10/15 RP 217. It continued drifting for about one hundred yards before it started

fishtailing. 9/10/15 RP 214. The vehicle fishtailed a little at first, back and forth before doing so violently. 9/10/15 RP 215. Shea thought the vehicle was going to go to the right into a field, but it suddenly turned and went left very fast. 9/10/15 RP 215. The vehicle went straight across the road striking the vehicle headed south. 9/10/15 RP 215. It looked like an explosion. 9/10/15 RP 216. Shea was still sitting in the turn lane. 9/10/15 RP 216. He did not recall ever seeing brake lights from the Mustang. 9/10/15 RP 216-7.

Shea called 911. 9/10/15 RP 216. Shea went up to the car with the girls. 9/10/15 RP 216. Someone else was with the driver, so Shea stayed with the passenger. 9/10/15 RP 216-7.

Dale Greenwood saw what occurred before the collision on October 31, 2013. 9/10/15 RP 195. Greenwood left work at a nearby refinery around 5:00 p.m. 9/10/15 RP 195-6. Greenwood saw a Mustang behind him that went around into a left turn lane at a light. 9/10/15 RP 196. While in line for the light, Greenwood heard the Mustang revving its engine from in front of him. 9/10/15 RP 197. It was unusual. 9/10/15 RP 197. There were one or two vehicles in front of the Mustang at the stop light. 9/10/15 RP 206.

Greenwood saw the vehicle immediately in front of him, accelerating rapidly following the left turn. 9/10/15 RP 198. The other vehicles turned off and the Mustang had a clear path up the hill. 9/10/15 RP 206. As the Mustang pulled away from him, up the hill, Greenwood lost sight of it.

9/10/15 RP 200. Greenwood was traveling at 50 miles per hour up the hill.
9/10/15 RP 200-1.

As Greenwood approached the intersection where Highway 20 meets Gibraltar Road, he entered a huge cloud of smoke and saw debris strewn across the road. 9/10/15 RP 202. Greenwood pulled to the right side of the road, put his hazard lights on and approached a car. 9/10/15 RP 203. Greenwood saw a young lady in the rear seat with a broken neck. 9/10/15 RP 203. He felt for pulse, but could not find one. 9/10/15 RP 203. He approached the driver, who he thought was deceased, but she gasped. 9/10/15 RP 203. Her eyes were open but she was immobile. 9/10/15 RP 203. The front seat passenger was starting to move around and he went to help her. 9/10/15 RP 204. He helped her out to the shoulder and sat with the girl until aid arrived. 9/10/15 RP 204.

Douglas Cantrell was also getting off work at the refinery shortly before the crash. 9/10/15 RP 234. Cantrell stopped at the light and headed up the hill after it turned. 9/10/15 RP 235. As he got to the top of the hill, out of nowhere, a black car went across the road and hit an oncoming vehicle. 9/10/15 RP 235. Cantrell saw vehicle parts flying everywhere and saw one vehicle go off into a ditch. 9/10/15 RP 236. Cantrell got to the car in the ditch first. 9/10/15 RP 236. He waded into the water about waist deep to get to the man and sole person in the vehicle. 9/10/15 RP 236-7. Cantrell asked

if he was okay and the man said “I’m fucked, I’m fucked.” 9/10/15 RP 237. Cantrell said the man said his legs hurt, but Cantrell was able to help him out across the trunk of his vehicle and onto land. 9/10/15 RP 237.

Cantrell approached the other vehicle and talked to the passenger in the other car, whose face was painted like a cat. 9/10/15 RP 238. She asked what happened. 9/10/15 RP 238. Others helped her out of the vehicle. 9/10/15 RP 238. Cantrell went to the driver’s side, checked the rear seat passenger and could tell she was dead. 9/10/15 RP 238. He checked the driver for a pulse but found none. 9/10/15 RP 238. She responded to the touch of her hand and started gasping for air. 9/10/15 RP 238. The side of the car was crushed, she was pinned in the vehicle and her leg was obviously broken. 9/10/15 RP 239. Cantrell sat with her until aid arrived. 9/10/15 RP 239.

Sean Morley was driving northbound on Highway 20 on October 31, 2013. 9/11/15 RP 290-2. He had left Oak Harbor shortly before five and it was still light out. 9/11/15 RP 291. The roadway was wet. 9/11/15 RP 291. Despite his window being up, Morley heard the sound of an engine revving and looked in his rearview mirror to see a black Mustang take a sharp overcorrection into another vehicle on the other side of the road. 9/11/15 RP 293, 296. Morley was stunned watching the situation play out. 9/11/15 RP 293. Morley saw the vehicle spinning while stuck together. 9/11/15 RP 294.

Morley went to the girls' vehicle and they did not look okay. 9/11/15 RP 297. He then helped the man out of the flooded ditch and gave his jacket to the girl so she could lie on the roadside. 9/11/15 RP 298.

Roberta Morley had been at her daughter's house in Oak Harbor and was headed northbound on Highway 20 following her son. 9/11/15 RP 300-2. Ms. Morley said it was still daylight and it had rained earlier. 9/11/15 RP 301. There was a darker colored vehicle between Ms. Morley and her son. 9/11/15 RP 302. Ms. Morley and the vehicles in front of her were traveling the speed limit. 9/11/15 RP 303, 309.

Ms. Morley saw at least three vehicles pull over to the right as a vehicle came southbound. 9/11/15 RP 304. The vehicle made a sharp ninety degree turn as it approached the girl's vehicle. 9/11/15 RP 304. From her angle, Ms. Morley did not see any swerving or fishtailing and it looked deliberate. 9/11/15 RP 305. Ms. Morley had been about a car length behind. 9/11/15 RP 306. The debris from the accident struck her vehicle and she pulled to the right side of the road and talked with her son who went to help. 9/11/15 RP 306-8.

Deputy Mark Sonnabend was the first officer on the scene. 9/11/15 RP 402-3. He saw the brown Acura was severely damaged and they were working on the right front passenger and the driver. 9/11/15 RP 404. Sonnabend advised dispatch of the severity of the accident. 9/11/15 RP 404.

Sonnabend contacted the driver who was being worked on by fire personnel. 9/11/15 RP 404. Sonnabend asked if he was driving the Mustang and then got his driver's license. 9/11/15 RP 405. Sonnabend contacted witnesses Henry Shea, Roberta Morley, Dalen Greenwood and Brian Cantrell and gave the witness statements to the troopers. 9/11/15 RP 405-6.

Trooper David Martin arrived from the south, shortly after Sonnabend. 9/11/15 RP 312, 316. Martin described that southbound in the location, there was a uphill climb on Highway 20 and at the crest of the hill, the road bends to the right and there is a left turn pocket for Gibraltar Road and no right turn pocket onto Miller Road. 9/11/15 RP 3145. It was overcast, raining off and on and there was standing water on the roadway. 9/11/15 RP 314. The rain had not been a hard rain. 9/11/15 RP 314.

Martin observed the black Mustang in a retention pond, a tremendous amount of debris in the road and another car about a hundred feet to the north of the Mustang. 9/11/15 RP 315. The Mustang had severe damage and the convertible roof was halfway up. 9/11/15 RP 315. The Acura appeared to have been hit by a bomb. 9/11/15 RP Aid crews were extracting the female driver from the car, while the driver of the Mustang and the passenger of the car had been transported. 9/11/15 RP 316.

Trooper Martin took over supervision of the scene pending arrival of a supervisor. 9/11/15 RP 318. Martin tried to preserve the scene and gather information to pass on to the detectives. 9/11/15 RP 318, 322.

Trooper Jesse Greene arrived around the same time as Trooper Martin. 9/11/15 RP 407, 410. Greene described the scene as if a bomb had gone off. 9/11/15 RP 409. Greene went to the hospital to check on the vehicle occupants. 9/11/15 RP 411.

Janesah Goheen had about fourteen different hospital staff working on her. 9/11/15 RP 411. Not wanting to interfere, Martin contacted Alysha Pickler. 9/11/15 RP 411-2. Goheen was dressed like a cat for Halloween, and recalled they were headed to Seattle, but little else. 9/11/15 RP 412.

Trooper Greene then contacted the defendant, Mr. Blackstock. 9/11/15 RP 412-3. Blackstock was on a backboard. 9/11/15 RP 413. Blackstock said he left work about 4:00 or 4:30, had nothing to drink and was headed southbound. 9/11/15 RP 413. Blackstock described that one vehicle turned left onto Gibraltar Road and the other turned right onto Miller Road. 9/11/15 RP 414. Blackstock said he continued through those vehicles, lost control and drove into the oncoming lane striking the Acura. 9/11/15 RP 414.

When asked how fast he was driving, Blackstock said 55 miles per hour, maybe more. 9/11/15 RP 414.

Samples of Blackstock's blood taken at the hospital after the accident were tested and found not to contain any alcohol or controlled substances. 9/11/15 RP 415-5, 9/15/15 RP 661-2.

Dr. Gary Goldfogel was the pathologist who examined Janeah Goheen. 9/11/15 RP 262-3, 266, 271. Goldfogel's examination is based in part from background information he obtained from the scene and subsequent attempt at medical treatment. 9/11/15 RP 268. Janeah had extensive trauma to her face, mouth, nose and across her upper chest. 9/11/15 RP 273-5. The internal examination revealed a tear in a major vein returning blood from her body to the heart causing her chest to fill up with blood. 9/11/15 RP 279. Janeah had a serious fracture of her left femur. 9/11/15 RP 283-4. Injuries to Janeah's hands suggested defensive injuries as if her hands were used to fend herself off in the crash. 9/11/5 RP 282. Janeah had been in excellent health. 9/11/15 RP 281. The toxicology screen gave no indication of alcohol or drug use. 9/11/15 RP 284.

Dr. Goldfogel opined that Janeah died as result of bleeding to death caused by blunt trauma occurring as a result of the collision. 9/11/15 RP 286.

Dr. Aldo Fusaro testified. 9/15/15 RP 715. He is the pathologist with the King County Medical Examiner's Office who examined the remains of Janesah Goheen. 9/15/15 RP 717-8. Dr. Fusaro did autopsy by review of the medical records and an external examination. 9/10/15 RP 719. Janesah had

significant bruising the brain, a broken neck, multiple pelvic fractures, a broken leg and numerous injuries to internal organs. 9/15/15 RP 724-5. The attempt to harvest organs for donation revealed injuries to numerous internal organs. 9/10/15 RP 726-9. Janesah Goheen, died on November 11, 2013, as a result of the totality of the injuries caused in the accident. 9/15/15 RP 720, 723, 730.

Detective Craig Cardinal was the lead detective assigned to the case. 9/10/15 RP 241-2, 9/15/15 RP 695. Cardinal arrived at the scene about 6:50 p.m. 9/10/15 RP 242. Cardinal identified numerous photographs from the scene of the accident. 9/10/15 RP 242-251, 9/14/15 RP 585-99, 617-27, 9/15/15 RP 681-694. Cardinal interviewed witnesses, gathered medical records, arranged testing of the blood and arranged for the power train control module (PCM) memory board replacement. 9/15/15 RP 695-6. Cardinal assisted in mapping the scene and described the resulting map. 9/14/16 RP 607-614.

Cardinal was able to determine the location of the collision based upon marks in the roadway. 9/14/15 RP 615. The location was just inside the northbound fog line. 9/14/15 RP 615.

Cardinal also took a video of the route up the hill through the accident location and back. 9/15/15 RP 697. The video was admitted. 9/15/15 RP 697 (Exhibit 174). The speed of the vehicle used for the video

was 40 to 50 miles per hour at most times, depending on traffic. 9/15/15 RP 701.

Cardinal chose not to do a full accident reconstruction to determine speeds given the lack of information. 9/14/15 RP 629. Facts about the about the roadway, pre-impact skids, angles of vehicle contact, all would have been assumptions that would readily cause a wrong result. 9/15/15 RP 631.

Trooper Scott Gustafson was called to the scene and documented the condition of the vehicles. 9/11/15 RP 349-5. The vehicles were taken to Burlington for further examination. 9/11/15 RP 353.

Gustafson took the tire depth of the vehicle, finding tread depths of 5/32 on the left front, 5/32 on the right front, 0/32d on the left rear and 1/32 on the right rear. 9/11/15 RP 356-7. 2/33 is the statutory minimum tread depth. 9/11/15 RP 388. The Mustang had a number of aftermarket parts added. 9/15/15 RP 673-4.

David Temple is a private mechanical accident consultant who was retained by the State. 9/11/15 RP 361-6. Temple had been trained by the state patrol as well as the U.S. Department of Transportation and the Traffic Safety Institute. 9/11/15 RP 362. His training and experienced was focused on the mechanical condition of vehicles, their components and how those contribute to accidents. 9/11/15 RP 362-3. Temple had worked for the State Patrol for 21 years on major accident investigations. 9/11/15 RP 364.

Temple examined the vehicles involved. 9/11/15 RP 366-7. Temple examined the tires, wheels, brakes, suspension, steering, throttle and engine. 9/11/15 RP 370-2. The brakes on the vehicle appeared to work. 9/11/15 RP 374. The throttle operated smoothly. 9/11/15 RP 380. The only mechanical condition of the Mustang contributing the collision was the tread depth. 9/11/15 RP 393.

The Mustang was a rear wheel drive vehicle. 9/11/15 RP 389. The lack of the tread depth on the rear would affect the rear traction on the vehicle. 9/11/15 RP 389-90. Moisture and the crown of the roadway would also affect traction. 9/11/15 RP 390.

Ed Collins, a Washington State Patrol Accident reconstructionist, testified that he attempted to obtain data from the 2006 Ford Mustang. 9/10/15 RP 88-90. Due to the amount of damage of the vehicle, he was unable to obtain data from the PCM of the vehicle. 9/10/15 RP 92-3. Collins testified that the PCM was able to be removed, and sent to Ford Motor Company in Detroit, where the memory chip was removed and installed in a new PCM so it could be examined. 9/10/15 RP 94-8.

Collins was able to retrieve the last twenty seconds of data prior to the airbag being deployed and the five seconds afterwards. 9/10/15 RP 101-2. Exhibit 130 contained the download of the data, while exhibits 131 and 132, displayed information in a graph. 9/10/15 RP 103-4, 107, 111.

The accelerator pedal had been pushed down fairly uniformly causing the vehicle to acceleration from 55 miles per hour to about 85 miles per hour. 9/10/15 RP 113. At 85 miles per hour a jump in the speed indicated a loss of control and the vehicle then decelerated. 9/10/15 RP 114, 119. The deceleration curve was erratic showing a loss of control and possibly fishtailing. 9/10/15 RP 115, 121. The vehicle gradually began decreasing speed until an abrupt change in speed a few seconds later showed the time of impact. 9/10/15 RP 121-2. The data showed that there had been no braking in the antilock braking system (ABS). 9/10/15 RP 107.

Collins concluded the Mustang was traveling a stable 55 miles per hour until about 10 & ½ seconds before the collision. 9/10/15 RP 123. At that point the accelerator was pushed hard with the throttle to 100 percent. 9/10/15 RP 123. The Mustang accelerated to 85 miles per hour. 9/10/15 RP 123. At that speed, the vehicle lost control, fishtailing. 9/10/15 RP 123-4. At 0.68 seconds before collision the data was consistent with broadside sliding. 9/10/15 RP 124.

Collins determined the Ford Mustang did not have any recalls or technical service bulletins that would apply or affect the collision. 9/10/15 RP 92.

The State also retained Richard Ruth. 9/14/15 RP 431. Ruth is a consultant in crash reconstruction, specializing in event data recorders.

9/14/15 RP 431. Ruth began working for Ford in 1973 to work on the air bag system in its earlier stages. 9/14/15 RP 432-3. He worked in a wide variety of assignments including electronic controls. 9/14/15 RP 433. Ruth began working in the Ford safety office, and was a designated expert. 9/14/15 RP 433. Ruth was transitioned to becoming an expert on data recorders in the power train control modules. 9/14/15 RP 434. Ruth retired from Ford in 2006. 9/14/15 RP 453. Prior to retiring Ruth worked on the power train control module used in the Mustang. 9/14/15 RP 453. In the eight years after retiring from Ford, Ruth began consulting specializing in data recorders, and conducted research into the accuracy of data recorders. 9/14/15 RP 435. Ruth also teaches a class on downloading and analyzing data from the electronic control module. 9/14/15 RP 436-7.

Ruth had specialized training in crash reconstruction and human factors. 9/14/15 RP 432. Human factors involve how long it takes people to perceive the situation and how long it takes to get the foot off the accelerator pedal and over to the brake pedal. 9/14/15 RP 432.’

Ruth testified that the 2006 Ford Mustang control module records sixteen different parameters including vehicle speed, transmission output shaft sense, accelerator pedal position, brake pedal, and traction control. 9/14/15 RP 440. The recorder retains the last 25.4 seconds worth of data prior to a catastrophic crash. 9/14/15 RP 441.

Ruth provided the opinion that the vehicle began slowing because the vehicle was fishtailing and turning sideways, not because of the brakes being applied. 9/14/15 RP 464-5. The vehicle fish tailing caused fluctuations in the recorded speed. 9/14/15 RP 467. The last true speed of the vehicle going straight was 77 miles an hour. 9/14/15 RP 468.

Ruth noted the top recorded speed was 85 miles per hour. 9/14/15 RP 473. Due to tire size differences and taking into account error, that resulted in a range of true vehicle speed of 81 to 88 miles per hour. 9/14/15 RP 476, 508. Ruth estimated the speed to 84 to 85 miles per hour. 9/14/15 RP 508. Ruth determined the speed at impact was likely 66 miles per hour. 9/14/15 RP 474, 495, 509.

The accelerator pedal position in the vehicle showed a reduction from 88 to 68 percent. 9/14/15 RP 479. At 68 percent, the vehicle would still have been accelerating. 9/14/15 RP 479-80. The data showed the pedal was modulating, showing there was no malfunction. 9/14/15 RP 510.

Ruth testified, the manner in which the vehicles collided, including the angles, the roadway and the sides of the road in the area, did not lend themselves to a momentum analysis to determine speed. 9/14/15 RP 482-4. Ruth testified that damage to the Mustang and the manner in which the vehicles collided showed the Mustang was rotated so the passenger side

front hit first, the vehicles did not engage and reach a common velocity and the Mustang then spun off. 9/14/15 RP 489.

Based upon the speed the Mustang was traveling the loss of control occurred about 380 feet before the point of impact. 9/14/15 RP 498-9. That placed the location slightly past the intersection. 9/14/15 RP 499. The initial data recorded the vehicle traveling at 50 miles per hour about two thousand feet before impact. 9/14/15 RP 500. Then there was a slight acceleration up to 55 miles per hour. 9/14/15 RP 500. Then the driver put his foot down on the pedal about eleven hundred feet before the impact and about five hundred feet before the intersection. 9/14/15 RP 500. That put the heavy acceleration point at the point where the left turn lane began. 9/14/15 RP 500.

Ruth concluded the five things that showed leading to a loss of control were a curved road, a vehicle turning in front, a wet roadway, nearly bald tires, and a driver pushing down on the accelerator pedal to nearly one hundred percent of the throttle. 9/14/15 RP 503, 509-10.

The defense called Robin Brown, a forensic engineer. 9/16/16 RP 738. He worked in vehicle accident analysis and worked mainly for private, non-governmental agencies. 9/16/16 RP 741, 747. Brown had testified as an expert in Canada and Washington State. 9/16/16 RP 747. Brown had reviewed the police reports. 9/16/16 RP 747. Brown's testimony was that the

force to the front of the Mustang was a lateral force from right to left. 9/16/16 RP 749-50. He saw matching damage to the passenger area of the Acura. 9/16/16 RP 751-2.

Brown's analysis of the speed showed that the vehicle had a maximum velocity of 88 miles per hour, but a deceleration to 47 miles per hour at the point of impact. 9/16/16 RP 755, 762, 789. Brown estimated the speed at the point of impact was loss of control was 62 to 67 miles per hour. 9/16/16 RP 763.

Brown opined that based upon his experience with breaking while sliding, it was unlikely that Blackstock had the ability to brake while fishtailing. 9/16/16 RP 782.

Brown also opined that the vehicle throttle opened more than the pressure applied on the pedal and did not reduce when the pedal pressure reduced. 9/16/16 RP 796. He opined the vehicle was traveling 62 to 67 miles per hour when Blackstock lost control and that the vehicle was going 58 to 59 miles per hour when Blackstock passed the Shea vehicle. 9/16/16 RP 798.

However, Brown completely discounted the bald tires as having any role in the calculation of the vehicle speeds or evaluation of the ability to control the vehicle. 9/16/16 RP 799-800.

On cross-examination, Brown acknowledged that his calculation of speed was dependent on the assumption that the impact speed was 47 miles

per hour. 9/16/16 RP 813-4. Brown's report evaluating speed did not take into the account, the pond the uphill bank or the rock surface where the Mustang ended up. 9/16/16 RP 823-4. Brown also acknowledged preparing a report where he used a post-impact speed number of 71 miles per hour. 9/16/16 RP 822-3.

The defendant did not testify. 9/16/16 RP 842.

3. Jury Instructions

The state proposed the standard instructions for reckless manner and disregard for safety of others.

To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.

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.

CP 148, 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 90.05 (3d Ed).

The instruction given by the trial court was modified slightly to apply the definition to both vehicular homicide and vehicular assault by changing the last sentence to read: "Ordinary negligence in operating a motor vehicle

does not render a person guilty of vehicular homicide or vehicular assault.”
CP 35, 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 90.05 (3d Ed).

Blackstock’s lone proposed instruction pertained to his decision not to testify. CP 43. Blackstock did not object to any instructions given or make an exception for failure to give any instructions. 9/16/15 RP 859.

4. Legal Financial Obligations

Blackstock’s declaration of indigence for the purpose of obtaining counsel for appeal described that he was self-employed as a roofer, that his wife does not work and has an adult child residing at home. CP 128. He described that he owned a house worth \$180,000 and that the remaining mortgage balance was \$50,000. He claimed to have \$22,000 in credit card debt, \$20,000 in attorney fees and that his wife has \$20,000 in student loans. CP 129. He claimed to have 7 vehicles totaling approximately \$22,500 in value. CP 129.

Blackstock was sentenced on October 14, 2015, to 48 months. CP 75. Assuming one-third good time eligibility, Blackstock could be released at approximately two years, eight months. RCW 9.94A.729(3)(e). That would make Mr. Blackstock’s age at release at fifty-seven. CP 85.

IV. ARGUMENT

1. **The failure to seek an additional instruction further defining disregard for safety of others was not ineffective assistance of counsel.**
 - i. **The appellant carries the burden of proving ineffective assistance by proving deficient performance which prejudices the appellant's case.**

When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

State v. Grier, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011).

Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An attorney's performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance prejudices a defendant if there is a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Killo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

State v. Lozano, 189 Wn. App. 117, 124-25, 356 P.3d 219, 222-23 (2015).

ii. The vehicular homicide and vehicular assault statutes have long used the term “disregard for the safety of others.”

The current version of the vehicular homicide and vehicular assault statutes use the terms “disregard for safety of others.”

(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.

(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.

In the 1937 session laws, upon creation of the negligent homicide by means of a motor vehicle, the legislature used the same “disregard for safety of others language.” Laws of Washington, 1937 ch. 189 §120 (previously RRS §6360-120):

When the death of any person shall ensue within one year as a proximate result of injury received by the operation of any 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.

Upon adoption of the “disregard for safety” prong of vehicular assault in 2001, the legislature used the same language that had applied to vehicular homicide. Laws of Washington, 2001, ch. 300, §1. The legislature had the ability to use the definition of negligence as provided in RCW 9A.08.010 and did not do so.

iii. Case law supports the “greater than ordinary negligence standard.”

The cases interpreting the “disregard for safety” language have approved the greater than ordinary negligence standard in instructing the jury.

In *State v. Partridge*, the trial court had instructed the jury that “[u]nder this statute, a finding that an accused is guilty of ordinary negligence supports a conviction.” *State v. Partridge*, 47 Wn.2d 640, 641-42, 289 P.2d 702 (1955). The trial court later granted a motion for new trial finding that the greater than ordinary negligence was required. The Supreme

Court analyzed prior case law holding that ordinary negligence was sufficient and overruled those decisions. The Court held:

We are satisfied that a finding of ordinary negligence is not sufficient to support a conviction under the act.

State v. Partridge, 47 Wn.2d 640, 645, 289 P.2d 702 (1955).

In *State v. Eike*, 72 Wn.2d 760, 435 P.2d 680 (1967), the jury was instructed as follows:

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.

The defense proposed an instruction which implied a greater mens rea:

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 perpetrate injury to another or to take known chances of so doing.

The Supreme Court upheld the trial court's denial of the proposed instruction.

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 also 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.

State v. Eike, 72 Wn.2d 760, 766, 435 P.2d 680 (1967).

In *State v. Brooks*, 73 Wn.2d 653, 440 P.2d 199 (1968), the Supreme Court upheld a conviction for negligent homicide despite a defense request to give an instruction on more than ordinary negligence.

Defendant assigns error to the court's refusal to give his proposed instruction No. 9 which required a finding of reckless driving and also declared that ordinary negligence is insufficient to support a verdict. Ordinary negligence, it is true, will not support a conviction of negligent homicide by means of a motor vehicle. On the subject of ordinary negligence, however, the court did instruct the jury in instruction No. 5 that "The term 'to operate a motor vehicle with disregard for the safety of others' is defined to mean more than inadvertence or momentary inattention to driving or mere absence of ordinary care." Perhaps as defendant suggests, this instruction falls short of perfection and could have been improved upon, but we note that it does set forth a proper statement of the law, and, in the absence of a better one offered by defendant, adequately covered the subject.

Although the court properly could have added to this instruction the declarative sentence that ordinary negligence as defined would be insufficient to support a conviction, defendant requested no such instruction, and the court, in defining the offense and describing its components, was not obliged to traverse the things which would not constitute negligent homicide. Courts are not required to give negative instructions (*State v. Harvey*, 57 Wn.2d 295, 356 P.2d 726 (1960)), although, in the interests of clarity, they may properly do so in some circumstances.

State v. Brooks, 73 Wn.2d 653, 658, 440 P.2d 199 (1968).

The instruction here adequately conveyed the required standard for vehicular homicide and vehicular assault based upon these prior cases.

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 35.

iv. Where the instruction for ordinary negligence was correct, Blackstock cannot establish prejudice to support ineffective assistance.²

Blackstock concedes that the instruction was “technically correct.” Brief of Appellant at page 32. By that concession, Blackstock concedes that his counsel was not ineffective. Thus there was not a “reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

² A court review of an ineffective assistance claim on direct appeal does not consider matters outside the record. *State v. Blight*, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977). There is no record about whether the decision was tactical. Blackstock also cannot establish that the decision, if made, was not a tactical decision. Allowing the jury to convict of a lesser charge of vehicular homicide and vehicular assault by disregard for safety of others resulted in Blackstock receiving a much lesser sentence.

However Blackstock goes on to contend that the instruction “did not adequately convey that *criminal* negligence is required.” Brief of Appellant at page 32 (italics in original). Blackstock goes on to describe Oregon analysis of negligent homicide and conclude that the Washington criminal negligence definition under RCW 9A.08.010 should be considered and applied.

He proposes on appeal that defense counsel would have been “justified in seeking an instruction” that included language that reads:

Disregard for 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.

Brief of Appellant at page 38.

Although counsel may have been “justified in seeking” the instruction, the trial court would not have been justified in giving the instruction.

The legislature has chosen the language applicable to the crimes of vehicular homicide and vehicular assault. In doing so, the legislature could have chosen to use the criminal negligence definition. Certainly the legislature had that option in 2001 when vehicular assault by disregard for safety of others alternative was enacted. The legislature did not do so. Courts

interpret that the legislature is aware of other statutory provisions. *In re Det. of Boynton*, 152 Wn. App. 442, 453, 216 P.3d 1089 (2009).

Furthermore courts presume that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting a statute to indicate legislative acquiescence in that decision. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). Thus, the legislature is aware of the court decisions that provide the more than ordinary negligence standard that the courts have interpreted into the disregard for safety language.

For both these reason, Blackstock cannot show that the criminal negligence definition from RCW 9A.08.010 would properly be applied to vehicular homicide or vehicular assault by disregard for safety of others.

2. This Court should grant appellate costs.

RCW 10.73.160(1) vests the appellate court with discretion to award appellate costs. See *State v. Sinclair*, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016) (sixty-six year old man serving twenty year sentence unlikely to be able to be pay appellate costs since he would be unlikely to find gainful employment).

Blackstock's declaration of indigence for the purpose of obtaining counsel for appeal described that he was self-employed as a roofer, that his

wife does not work and has an adult child residing at home. CP 128. A review of his assets and debts showed approximately \$130,000 in assets. CP 129. Blackstock made no assertion of past earnings.

Assuming one-third good time eligibility, based upon the 48 month sentence, Blackstock would be age at fifty-seven upon release. CP 85, RCW 9.94A.729(3)(e).

The State contends under these circumstances, Blackstock should be required to pay appellate costs.

V. CONCLUSION

For the foregoing reasons, Ira Blackstock's convictions for two counts of Vehicular Homicide and one count of Vehicular Assault must be affirmed.

DATED this __6th__ day of October, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Dana M. Nelson, addressed as: Nielsen, Broman & Koch, , 1908 E. Madison Street, Seattle, WA 98122 I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this __6h__ day of October, 2016.



KAREN R. WALLACE, DECLARANT