

NO. 33591-0-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

RICKY L. KNOKEY,

Appellant.

FILED
COMPTROLLER
06/11/11 2:05 PM
STATE OF WASHINGTON
CLERK OF COURT

CM 5-24-06

ON APPEAL FROM THE
SUPERIOR COURT OF GRAYS HARBOR COUNTY

Before the Honorable David Foscue, Judge
and Before the Honorable F. Mark McCauley, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
C. STATEMENT OF THE CASE.....	6
1. <u>Procedural facts</u>	6
2. <u>CrR 3.5 Motion</u>	8
3. <u>CrR 3.6 hearing</u>	11
4. <u>Trial Testimony</u>	13
5. <u>Sentencing</u>	16
D. ARGUMENT	17
I. <u>THE STATE DID NOT MEET THE HEAVY BURDEN OF PROVING THAT KNOKEY WAIVED HIS PRIVILEGE AGAINST SELF-INCRIMINATION WHEN STATE PATROL OFFICER BELT QUESTIONED HIM AT THE HOSPITAL FOLLOWING THE CRASH</u>	17
VI. <u>THE STATE OBTAINED A WARRANT TO SEARCH THE VEHICLE ON MARCH 27, 2002 WHEN THE VEHICLE WAS IMPOUNDED AND UNDER THE CONTROL OF LAW ENFORCEMENT. THE STATE WAS REQUIRED TO OBTAIN ANOTHER WARRANT TO CONDUCT A SUBSEQUENT SEARCH OF THE VEHICLE IN JUNE, 2004</u>	25

III.	<u>THE TRIAL COURT ERRED IN FAILING TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW</u>	27
VI.	<u>THE JURY INSTRUCTIONS RELIEVED THE STATE OF THE BURDEN OF PROVING THE CRIME AS CHARGED</u>	30
	a. <u>Vehicular Homicide and Proximate Cause</u>	31
	b. <u>Instructions</u>	32
	f. <u>Counsel’s Ineffectiveness Permits This Court to Review the Issue on Appeal</u>	34
	d. <u>Prejudice</u>	36
V.	<u>UNDER WASHINGTON LAW, TO CONVICT A DRIVER OF VEHICULAR HOMICIDE AS A CONSEQUENCE OF BEING INTOXICATED, THE STATE MUST PROVE THAT THE INTOXICATED CONDITION OF THE DRIVER WAS A PROXIMATE CAUSE OF THE FATALITY</u>	36
VI.	<u>THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE, AS A MATTER OF LAW, FOR THE COURT TO GIVE INSTRUCTION NO. 4 REGARDING THE COMMISSION OF VEHICULAR HOMICIDE AS A CONSEQUENCE OF CAUSING A DEATH WHILE DRIVING IN A RECKLESS MANNER</u>	39
E.	CONCLUSION	41
F.	APPENDIX	A-1

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>Ferree v. Doric Co.</i> , 62 Wn.2d 561, 383 P.2d 900 (1963)	30
<i>Little v. Rhay</i> , 68 Wn.2d 353, 413 P.2d 15 (1966).....	28
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	36
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996).....	23
<i>State v. Bradley</i> , 141 Wn.2d 731, 10 P.3d 358 (2000)	36
<i>State v. Braun</i> , 82 Wn.2d 157, 509 P.2d 742 (1973)	25
<i>State v. Bray</i> , 52 Wn. App. 30, 765 P.2d 1332 (1988)	32
<i>State v. Broadaway</i> 133 Wn.2d 118, 942 P.2d 363 (1997).....	23
<i>State v. Cronin</i> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	34
<i>State v. Cushing</i> , 68 Wn. App. 388, 842 P.2d 1035 (1993).....	23
<i>State v. Cuzzetto</i> , 76 Wn.2d 378, 457 P.2d 204 (1969)	25
<i>State v. Dailey</i> , 93 Wn.2d 454, 610 P.2d 357 (1980)	30
<i>State v. Davis</i> , 73 Wn.2d 271, 438 P.2d 185 (1968).....	18, 19, 20, 21, 22
<i>State v. Erho</i> , 77 Wn.2d 553, 463 P.2d 779 (1970).....	21
<i>State v. Fateley</i> , 18 Wn. App. 99, 566 P.2d 959 (1977)	40
<i>State v. Gardner</i> , 28 Wn. App. 721, 626 P.2d 56 (1981)	25
<i>State v. Giedd</i> , 43 Wn.2d 787, 719 P.2d 946 (1986)	37
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	39
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	26
<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	30
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	27
<i>State v. Hescoek</i> , 98 Wn. App. 600, 989 P.2d 1251 (1999).....	29
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003)	27

<i>State v. Knowles</i> , 46 Wn. App. 426, 730 P.2d 738 (1986)	40
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999)	27
<i>State v. MacMaster</i> , 113 Wn.2d 226, 778 P.2d 1037 (1989).....	31, 37
<i>State v. Miller</i> , 60 Wn. App. 767, 807 P.2d 893 (1991)	28, 29, 40
<i>State v. Myers</i> , 86 Wn.2d 419, 545 P.2d 538 (1976)	18, 21, 22
<i>State v. Myrick</i> , 102 Wn.2d 506, 688 P.2d 151 (1984).....	27
<i>State v. Ng</i> , 110 Wn.2d 32, 750 P.2d 632 (1988)	23
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	27
<i>State v. Patterson</i> , 8 Wn. App. 177, 504 P.2d 1197 (1973).....	28
<i>State v. Rempel</i> , 114 Wn.2d 77, 785 P.2d 1134 (1985)	40
<i>State v. Reuben</i> , 62 Wn. App. 620, 814 P.2d 1177 (1991)	24, 25
<i>State v. Reynolds</i> , 80 Wn. App. 851, 912 P.2d 494 (1996).....	29
<i>State v. Riley</i> , 19 Wn. App. 289, 576 P.2d 1311 (1978).....	23
<i>State v. Rivas</i> , 126 Wn.2d 443, 896 P.2d 57 (1995)	31, 32
<i>State v. Roberts</i> , 142 Wn.2d 451, 14 P.3d 713 (2000).....	34
<i>State v. Robbins</i> , 68 Wn. App. 873, 846 P.2d 585 (1993)	40
<i>State v. Salas</i> , 74 Wn. App. 400, 873 P.2d 578 (1994).....	31
<i>State v. Sanchez</i> , 42 Wn. App. 225, 711 P.2d 1029 (1985)	40
<i>State v. Setzer</i> , 20 Wn. App. 46, 579 P.2d 957 (1978)	23
<i>State v. Severns</i> , 13 Wn.2d 542, 125 P.2d 659 (1942).....	32
<i>State v. Turner</i> , 103 Wn. App. 515, 13 P.3d 234 (2000)	32
<i>State v. Vannoy</i> , 25 Wn. App. 464, 610 P.2d 380 (1980).....	24, 25
<i>State v. Vrieling</i> , 144 Wn.2d 489, 28 P.3d 762 (2001).....	26
<i>State v. Williamson</i> , 72 Wn. App. 619, 866 P.2d 41 (1994).....	29

<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Haynes v. Washington</i> , 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).....	22
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	18, 19, 20, 21, 22, 23, 25
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	36
<i>Wilson v. United States</i> , 162 U.S. 613, 16 S. Ct. 895, 40 L. Ed. 1090 (1896).....	22
<i>Withrow v. Williams</i> , 507 U.S. 680, 13 S. Ct. 1745, 123 L. Ed. 2d 407 (1993).....	22

<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 46.61.520	31
RCW 46.61.520(1).....	6, 7
RCW 46.61.520(1)(a)	6, 7
RCW 46.61.520(1)(c)	7

<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
U.S. Const. Amend. IV	26
U.S. Const. Amend. VI.....	3, 33, 36
U.S. Const. Amend. XIV	3, 33, 34, 36
Wash. Const. Art. I, § 3	33, 34
Wash. Const. Art. I, § 7	26
Wash. Const. Art. I, § 22	3, 36
Wash. Const. Art. IV, § 16.....	

<u>COURT RULES</u>	<u>Page</u>
CrR 3.5	4, 28
CrR 3.5(c)	28
CrR 3.6.....	4, 28

CrR 6.1(d)	30
CrR 7.4(a)(3).....	7

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the Appellant's Criminal Rule 3.5 motion to suppress statements allegedly made to law enforcement on March 20, 2002, that he was the driver of the vehicle.

2. The trial court erred in denying the Appellant's CrR 3.6 motion to suppress items obtained from the wrecked car by law enforcement in June, 2004 pursuant to a warrantless search of the vehicle, heard October 11, 2004.

3. The trial court erred in denying the Appellant's CrR 7.4(a)(3) motion to arrest judgment, based on the lower court's ruling denying the defense motion to suppress items obtained from the car by law enforcement in June, 2004 pursuant to a warrantless search of the vehicle.

4. The trial court erred by failing to enter Findings of Fact and Conclusions of Law following the CrR 3.5 suppression hearing conducted December 15, 2003.

5. The trial court erred by failing to enter Findings of Fact and Conclusions of Law following the CrR 3.6 suppression hearing conducted October 11, 2004.

6. The Appellant assigns error to the trial court's jury instruction

No. 8:

The term “proximate cause” means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened. There may be more than one proximate cause of the death.

7. The Appellant assigns error to the trial court’s jury instruction No. 4, describing the elements the State must prove in order to convict the Appellant of vehicular homicide:

To convict the defendant of the crime of Vehicular Homicide, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (6) That on or about March 20, 2002, the defendant drove or operated a motor vehicle;
 - (7) That the defendant’s driving proximately caused injury to Richard Pinnell;
 - (8) That at the time of causing the injury, the defendant was operating motor vehicle
 - (a) while under the influence of or affected by the use of intoxicating liquor and/or drugs;
or
 - (b) in a reckless manner;
or
 - (c) with disregard for the safety of others;
- That the injured person died within three years as a

proximate result of the injuries; and

That the acts occurred in Grays Harbor County,
Washington.

8. The Appellant was denied effective assistance of counsel when his counsel proposed instructions that permitted him to be convicted beyond the language of the charge. U.S. Const., Amend. VI, XIV, Const., Art. I, § 22.

9. The State presented insufficient evidence to convict the Appellant of vehicular homicide.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State Trooper who questioned Knokey testified that he read Knokey his constitutional warnings and that Knokey understood them. However, there was no showing that Knokey expressly waived those rights and the Trooper did not obtain a signed written waiver from Knokey. Knokey testified that he did not remember being read his constitutional warnings. Did the State fail to meet its heavy burden of proof that Knokey knowingly, intelligently, and voluntarily waived his constitutional privilege against self-incrimination? Assignment of Error No. 1.

2. Did the trial court err in denying the Appellant's motion to suppress his statements where Appellant Ricky Knokey was questioned by law enforcement and may have been in pain and shock due to the fact that he

was questioned approximately three hours after a devastating accident in which he was injured, and his friend killed, and where the Appellant was suffering from broken ribs, a collapsed lung, and head injuries? Assignment of Error No. 2.

3. Did the lower court err in denying the defense motion to suppress items obtained from the wrecked car by law enforcement in June, 2004, where the police had a warrant to search the car on March 27, 2002, shortly after the crash, but did not obtain a search warrant to search the vehicle 26 months later? Assignment of Error No. 2.

4. Did the lower court err in denying the defense motion to arrest judgment pursuant to CrR 7.4(a)(3), following the lower court's previous ruling denying the defense motion to suppress items obtained from the wrecked car by law enforcement in June, 2004, where the police had a warrant to search the car in March, 2002, shortly after the crash, but did not obtain a search warrant to search the vehicle 26 months later? Assignment of Error No 3.

5. Did the trial court err in failing to enter Findings of Fact and Conclusions of Law, contrary to Criminal Rule 3.5 which provides that the suppression hearing, "the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4)

conclusion as to whether the statement is admissible and the reasons therefore”? Assignment of Error No. 4.

6. Did the trial court err in failing to enter Findings of Fact and Conclusions of Law, contrary to Criminal Rule 3.6 which provides that “[i]f an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law”? Assignment of Error No. 5.

7. Where the State charged that the Appellant’s driving was “the proximate cause” of death, was it constitutional error to instruct the jury that it could convict if it found that the driving was “a proximate cause” of the death? Assignment of Error No. 6.

8. Does Washington law require that the intoxicated condition of a driver be a proximate cause of the death of another in order for the driver to be found to have committed vehicular homicide? Assignments of Error No 6 and 7.

9. Where defense counsel proposed instructions that permitted the jury to convict the Appellant of something less than what was charged, was the Appellant denied effective assistance of counsel? Assignment of Error No. 8.

10. Where the State presented evidence that the Appellant had a BAC of .05 approximately two and a half hours after the wreck, and where an

expert witness opined, through extrapolation, that the Appellant's BAC was .08 or .09 at the time of the wreck, and where the Appellant's blood contained a metabolite of THC, did the State present sufficient evidence that intoxication was a causal connection between the Appellant's alleged criminal conduct (i.e. the intoxication) and the fatality? Assignment of Error No. 9.

11. Did the instructions give relieve the State of its burden of proving every element of the charge? Assignments of Error No. 6, 7 and 9.

C. STATEMENT OF THE CASE¹

1. Procedural History:

Appellant Ricky L. Knokey was charged by Information filed in Grays Harbor County Superior Court on August 4, 2003, with one count of vehicular homicide, contrary to RCW 46.61.520(1) and (1)(a). Clerk's Papers [CP] at 1-2. The State alleged that Knokey caused the death of Richard Pinnell while driving a motor vehicle while under the influence of intoxicating liquor and/or drugs in Grays Harbor County, Washington. CP at 1-2.

The defense moved pursuant to Criminal Rule 3.5 for suppression of

¹This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

statements allegedly made to State Patrol Trooper Aaron Belt at the hospital following the wreck on March 20, 2002. CP at 8-10. The motion was heard by Judge F. Mark McCauley, who denied the motion on December 15, 2003. Report of Proceedings [RP] at 63-64. Findings of fact and conclusions of law were not entered.

The matter was tried to a jury on May 25, 2004. The jury was unable to reach a verdict and a mistrial was declared on June 1. The State filed an Amended Information on June 14, 2004, charging Knokey with vehicular homicide, by all alternate means, contrary to RCW 46.61.520(1) and (1)(a)–(c).² CP at 48. Knokey was retried on January 4, 2005. Again a jury was unable to reach a unanimous verdict and Judge McCauley ordered a mistrial on January 10, 2005.

² 46.61.520 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.

(2) Vehicular homicide is a class A felony punishable under chapter 9A.20 RCW, except that, for a conviction under subsection (1)(a) of this section, an additional two years shall be added to the sentence for each prior offense as defined in RCW 46.61.5055.

Knokey was tried a third time on June 28, 29, 30, and July 1 and 5, 2005, Judge McCauley presiding. The jury returned a guilty verdict on July 5, and found by special verdict that Knokey was under the influence of intoxicating liquor and/or drugs, and that he drove in a reckless manner with disregard for the safety of others, following the conclusion of the evidentiary portion of the trial on July 1. CP at 114, 115.

Defense counsel moved for arrest of judgment pursuant to CrR 7.4(a)(3) on the basis that the State failed to prove that Knokey was the driver of the car on March 20, 2002, and that evidence seized by law enforcement in June, 2004 should have been suppressed. CP at 138-139. Defense counsel also moved for new trial pursuant to CrR 7.5 on the allegation that a juror did not disclose that he and Knokey were members of the same graduating class at Hoquiam High School. CP at 140-146, 147-63. The motions were both denied.

2. CrR 3.5 Motion

On March 20, 2002, the Appellant Ricky Knokey was involved in a motor vehicle accident at the Grass Creek Loop Road area of State Route 109 near Hoquiam, Washington. Knokey sustained numerous injuries, including head injuries, injuries to his ribs, and a collapsed lung. His friend Richard Pennill died at the scene. The State alleged that Knokey was driving the car

at the time of the wreck. CP at 48. Knokey denies that he was the driver of the car and disputes that the State provided sufficient evidence to prove that he was the driver.

Trooper Aaron Belt, who works for the Washington State Patrol, was dispatched to an accident scene on State Route 109 near Hoquiam on March 20, 2002. RP (12.15.03) at 10. He arrived at the scene at approximately 9:00 p.m. RP (12.15.03) at 11. When he arrived, Knokey had been placed in an ambulance. RP (12.15.03) at 11. He had lacerations to his head and was conscious. RP (12.15.03) at 12. Knokey was transported to Grays Harbor Community Hospital. RP (12.15.03) at 12. He was strapped to a backboard at the time he was transported and remained strapped to the board when Trooper Belt questioned him at the hospital. RP (12.15.03) at 15.

Trooper Belt went to the hospital and saw Knokey at approximately 9:55 p.m. RP (12.15.03) at 12. He testified that Knokey requested that Trooper Belt tell his parents about the accident. RP (12.15.03) at 13. He testified that Knokey's speech was not slurred. RP (12.15.03) at 13. He testified that he could smell the odor of intoxicants on his breath. RP (12.15.03) at 13. Trooper Belt stated that Knokey said that he was still living at the address on his driver's license and gave his parents' telephone number. RP (12.15.03) at 13. Knokey was taken for x-rays and Trooper Belt called

Knokey's parents. RP (12.15.03) at 13.

After he talked with Knokey's parents, they arrived at the hospital. Knokey was returned from the x-ray area. Knokey was talking with his parents when Trooper Belt returned to the room. RP (12.15.03) at 14-15. Trooper Belt testified that he read Knokey his *Miranda* warnings at 11:19 p.m. and asked Knokey if he understood his rights. RP (12.15.03) at 15. CrR 3.5 Exhibit 1. He testified that Knokey stated that he understood his rights. RP (12.15.03) at 16. Trooper Belt did not have him sign the form that he understood his rights "because he was laying on the backboard strapped down" RP (12.15.03) at 17. Trooper Belt stated that he asked Knokey what he remembered from the incident, and testified that he remembered driving and then being in an ambulance. RP (12.15.03) at 17. He stated that he asked Knokey if he was driving, and Knokey said 'yes.' RP (12.15.03) at 17. He stated that he asked if Knokey had any passengers in the car, and he said that he thought he was supposed to pick someone up, but that that he did not remember having any passengers. RP (12.15.03) at 17. He testified that Knokey said that the wreck occurred on Route 109 and that he was heading toward the ocean, coming from town. RP (12.15.03) at 18.

Dr. Brent Rowe testified that he treated Knokey for a chest injury at approximately 10:30 a.m. on March 21, 2002. RP (12.15.03) at 35-36. He

stated that Knokey had superficial wounds to his head and face that were treated by the emergency room physician. RP (12.15.03) at 36. He stated that Knokey also had a right lung injury including a pneumothorax, and blood filling the chest cavity, called a hemothorax. He also had a displaced right clavicle fracture and fracture to his right second rib, a fracture to his thoracic vertebrae, multiple contusions to his back, and lacerations and contusions to his right leg. RP (12.15.03) at 36. Dr. Rowe testified that Knokey would have felt “a lot of pain” and had pain control issues throughout his hospitalization. RP (12.15.03) at 37. He testified that he initially required intravenous narcotic pain management, and then needed oral pain management until the time of discharge from the hospital. RP (12.15.03) at 37.

Knokey’s father, Ken Knokey, stated that he remembered Trooper Belt talking with his son, but did not remember that the trooper read him his *Miranda* warnings. RP (12.15.03) at 50. He stated that his son was able to remember some things, but that he “didn’t recollect [the accident] at all.” RP (12.15.03) at 50. His mother, Dixie Knokey, stated that her son did not know why he was in the hospital and asked her what happened to him when Trooper Belt came into the room. RP (12.15.03) at 52. She stated that her son’s hands were not strapped down and that he was able to move them. RP

(12.15.03) at 53.

Rickey Knokey testified that he did not have a recollection of being at the Grays Harbor Community Hospital, only that he remembered “some people being there and talking to me,” but that he did not know the day. RP (12.15.03) at 55. He remembers being in pain. RP (12.15.03) at 55. He stated that he did not remember trooper Belt being at the hospital and did not remember talking with him. RP (12.15.03) at 55.

The lower court judge denied the motion to suppress and found that the totality of the circumstances, that Knokey stated that he understood his rights, and then voluntarily talked to Trooper Belt. RP (12.15.03) at 62. Judge McCauley found that Knokey knowingly, voluntarily, and intelligently spoke to the officer. RP (12.15.03) at 64. He also found that the fact that Knokey was in pain “may be a slight factor,” that there was no testimony that pain causes a person not to be able to understand questions. RP (12.15.03) at 63.

3. CrR 3.6 hearing:

Following the accident, State Patrol officers engaged in a follow-up investigation. Washington State Patrol Detective David Killeen obtained items from Knokey’s wrecked car while it was located in a fenced area located in Hoquiam, controlled by the Washington State Patrol. Items

obtained by David Killeen include the passenger side door interior panel, the front passenger seatbelt, the emergency brake housing, metal review mirror mount, and the car's windshield. RP (10.11.04) at 14-15. These items were sent to a police crime laboratory in Tacoma for testing. These items were obtained without a search warrant. Defense counsel moved for suppression of the items and the motion was heard by the Honorable David Foscue on October 11, 2004. Counsel argued that David Killeen entered the fenced area at the request of the prosecution to obtain items from the car in June, 2004, shortly after the first trial. RP (10.11.04) at 9. This occurred approximately 26 months after a search warrant was issued to search the car in the days following the wreck in March, 2002. After hearing argument, Judge Foscue denied the motion, stating:

I am surprised there isn't case [law] from Washington on point, but given the fact that there is no case in Washington and counsel has found some cases out of state I am going to go with those cases. And it seems reasonable to me, in any event, when the vehicle itself has been seized as evidence that it's not necessary to—and there has been a search warrant, particularly, there has been a search warrant authorizing search of the vehicle, that, plus the fact that the vehicle itself is in evidence that it has not been in Mr. Knokey's possession for 20 some-odd months. And that it's been in the sheriff's possession for that period of time, but it's not necessary to get a subsequent warrant. It's not like something that was in the property box when he was arrested and he may have an expectation of privacy for that.

...

[T]his is an item that was seized when a crime had been committed it

was seized as an instrument of the crime, and its important to both sides for evidence.

RP (10.11.04) at 22-23.

4. Trial testimony:

Steve Voss testified that he and Knokey, and Rick Pinnell³ were building a three story house on March 20, 2002. RP at 110. They stopped work at 4 or 4:30 p.m. RP at 111. He later met both of them at Hunter's Pub. RP at 112. Voss had had a beer before they got there, and then they split a pitcher between the three of them. RP at 112. They left the tavern at 6:30 or 7:30 p.m. RP at 113. State Trooper Elizabeth Bigger testified that Voss told her that he, Knokey, and Pinnell had three pitchers of beer at Hunter's Pub. RP at 228.

John Lokken testified that Pinnell and Knokey came to his house on March 20, 2002 at approximately 8:30 p.m. RP at 117. Pinnell asked him to give a message to another person that he could not make a payment for a motorcycle he was buying through Lokken. RP at 118. He stated that both Pinnell and Knokey were drinking beer. RP at 118. He stated that Knokey did not appear to be under the influence of alcohol. RP at 119. He stated that they came over in Knokey's car, but that he did not see who was driving the

³ Also referred to as Rick Paulzine. RP at 110

vehicle when they came over. RP at 123. Knokey is the registered owner of the vehicle, a 1979 Toyota Celica. RP at 221-22.

Bruce Hayes, a captain with the Ocean Shores Fire Department, encountered a wrecked car while driving on State Route 109 on the evening of March 20, 2002. RP at 125-26. Knokey was standing on the road, walking around, and was “extremely agitated.” RP at 127. He reported that Knokey was concerned about a person named “Steve.” RP at 128-29. He located a body on the side of the road approximately 30 to 40 feet from the wreck. RP at 130. The body had sustained massive head trauma. RP at 131.

Hayes did not smell alcohol on Knokey’s breath. RP at 135. David Hagenbuch, an emergency medical technician with the Hoquiam Fire Department, testified that he smelled alcohol on Knokey’s breath at the scene. RP at 146, 152, 156. Mark Peterson, a fireman with the City of Hoquiam, testified that Knokey told him twice that he was the driver. RP at 160, 163. Peterson stated that he smelled alcohol on Knokey. RP at 162. Matt Loman, a volunteer firefighter with Grays Harbor County, testified that while in the ambulance Knokey asked “what have I done, what have I done? I just killed my friend. God what have I done,” and that he repeated this three to four times. RP at 180.

Trooper Bigger testified that she concluded that Knokey was the driver of the car at the time of the wreck. RP at 236, 277. Trooper Bigger testified that she believed that neither seatbelt was used at the time of the crash. RP at 253.

Trooper Belt testified that he smelled intoxicants when he entered the hospital room to talk to Knokey. RP at 315. He testified that after Mirandizing him, Knokey stated that he remembered driving and then being at the hospital. RP at 317. He stated that when asked if Knokey was the driver of the car, he said 'yes.' RP at 317. Hospital staff administered a blood draw at approximately 11:30 p.m. RP at 319. Trooper Belt stated that he believed that Knokey was the driver of the car. RP at 339.

Melissa Pemberton testified that she found 15 nanograms of carboxyl THC in Knokey's blood at the time of the blood draw following the crash. RP at 495. She found .05 grams for one hundred milliliters of blood at 11:30 p.m on March 20, 2002. RP at 497. David Predmore testified that carboxyl THC is a metabolite of THC and has no effect on a person's sobriety. RP at 542, 545.

Dr. Rowe, who treated Knokey, testified that he saw no sign of a steering wheel injury when he treated Knokey after the wreck. RP at 566. Dr. Rowe stated that he could not conclusively determine whether Knokey was

driving the car. RP at 568.

A motion to dismiss the case at the conclusion of the State's case-in-chief was denied. RP at 527-28.

No objections to jury instructions given or exceptions to instructions proposed but not given were made by either counsel. RP at 775.

5. Sentencing.

At sentencing on September 26, 2005, counsel for the defense and prosecution agreed that Knokey had an Offender Score of "0" and a standard range of 31 to 41 months. RP (9.26.05) at 11. The State recommended the top of the standard range. RP (9.26.05) at 11. In its sentencing memorandum, defense counsel requested that the court impose 31 months, or an exceptional sentence downward. At sentencing the defense requested a sentence of 31 months, the bottom of the standard range. RP (9.26.05) at 15. Knokey was afforded an opportunity for allocution. RP (9.26.05) at 17. The trial court sentenced Knokey to 36 months. RP (9.26.05) at 18. CP at 214-219.

Timely notice of appeal was filed on October 14, 2005. CP at 220-226. This appeal follows.

D. ARGUMENT

I. THE STATE DID NOT MEET THE HEAVY

**BURDEN OF PROVING THAT KNOKEY
WAIVED HIS PRIVILEGE AGAINST SELF-
INCRIMINATION WHEN STATE PATROL
OFFICER BELT QUESTIONED HIM AT THE
HOSPITAL FOLLOWING THE CRASH**

Counsel for Appellant Ricky Knokey filed a motion to suppress statements allegedly made to law enforcement on March 20, 2002, shortly after the crash. The suppression motion was heard by Judge F. Mark McCauley on December 15, 2003. The defense challenged the admissibility of the custodial statements on the basis that the statements were obtained as the result of questioning that took place within three hours of a severe wreck in which Knokey sustained multiple injuries, including wounds to his head, fractured ribs, and a collapsed lung. RP at 555.

The Appellant assigns error to the lower court's ruling denying his motion to suppress his statements under Criminal Rule 3.5. Specifically, Knokey assigns error to Trooper Belt's questioning him shortly after the devastating wreck when the extent of his injuries, the amount of pain and shock he may have been experiencing were unknown to the State Trooper, and asserts that the extent of his injuries—and resulting shock---made a knowing, intelligent, and voluntary waiver of his constitutional rights an impossibility.

Trooper Belt claimed that when he spoke to Knokey in the hospital

immediately after his surgery, he administered to Knokey his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and Knokey subsequently made statements about the wreck, including stating that he was the driver of the car. RP (12.15.03) at 17. Knokey denied that he remembered that Trooper Belt warned him of his rights and denied that he waived those rights. RP (12.15.03) at 55. Trooper Belt did not obtain Knokey's signature on a waiver form. He had no documentary proof that Knokey received *Miranda* warnings or waived his rights.

Since Knokey disputed Trooper Belt's claim that he had waived his rights, and there was no evidence to corroborate that claim, the trial court erred by admitting Knokey's statements. *Miranda*, 384 U.S. at 475; *State v. Davis*, 73 Wn.2d 271, 288, 438 P.2d 185 (1968); *State v. Myers*, 86 Wn.2d 419, 545 P.2d 538 (1976).

The Fifth Amendment to the United States Constitution prohibits introduction of a defendant's custodial statement at trial unless he or she has been properly warned of his constitutional rights and has knowingly, intelligently and voluntarily waived those rights. *Miranda*, 384 U.S. at 444. "[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be

used against [the defendant]. *Id.* at 479.

There was no dispute in this case that Knokey's alleged statements in the hospital were the product of custodial interrogation. Knokey was not free to leave; he had been severely injured approximately three hours before he was given his *Miranda* warnings and he was rendered immobile because he was strapped to a backboard. The only disputed issues at the CrR 3.5 hearing were whether Trooper Belt informed Knokey of his rights, and whether Knokey voluntarily waived them.

In *Miranda*, the United States Supreme Court made clear that when a defendant is interrogated outside the presence of his attorney, “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to . . . counsel.” 384 U.S. at 475. The Washington Supreme Court, in turn, recognized that as a result of *Miranda*, “we must now require a greater quantum and quality of proof . . . when we apply the ‘substantial evidence’ test upon review of a trial court’s findings as to the validity of any accused’s waiver.” *Davis*, 73 Wn.2d at 284.

Because such proof is lacking in this case, the trial court’s finding of a valid waiver should be reversed. The only evidence that Knokey had understood and waived his rights was trooper belt’s testimony. Trooper belt

did not obtain a written waiver, nor did he testify that Knokey expressly stated that he waived his rights.

This evidence in itself is insufficient to meet the State's burden. Both *Miranda* and *Davis* emphasized that a waiver will not be presumed simply from silence after the warnings are given or even from the fact that a statement is eventually obtained. *Miranda*, 384 U.S. at 475; *Davis*, 73 Wn.2d at 286. In addition, both cases recognized that where the defendant testifies and denies that he was properly warned or that he waived his rights, it is incumbent on the prosecution to present some additional evidence to corroborate interrogating officer's claims. *Miranda*, 384 U.S. at 475-76; *Davis*, 73 Wn.2d at 288.

In *Davis*, one officer testified that he had warned the defendant of his rights, and that the defendant waived those rights and made a statement. The defendant, in contrast, testified that he declined to talk without having an attorney present, and denied that he made a statement. *Davis*, 73 Wn.2d at 274-75. The court noted that the State did not call a second officer who was supposedly present during the interrogation, that the testifying officer's account was not supported by any other independent evidence, and that it was contradicted by the defendant. *Id.* at 288. Therefore the State failed to meet its burden under *Miranda*. *Id.* See also *State v. Erho*, 77 Wn.2d 553, 558,

463 P.2d 779 (1970) (statement inadmissible where State failed to corroborate testimony of single interrogating officer with that of other officers present).

Here, Knokey testified that he was never warned of his rights. RP (12.15.03) at 55. Thus the hearing was the same “swearing contest” between defendant and interrogator which the court dealt with in *Davis*, 73 Wn.2d at 286. As that case made clear, such a contest cannot be resolved, as the trial court did here, simply by declaring the officer more credible. Rather, the complete lack of corroboration of Trooper Belt’s testimony shows that the State failed to meet its burden of proof. *Id.* at 288.

The insufficient nature of the State’s proof in this case is also demonstrated by the decision in *Myers*, 86 Wn.2d at 427-28. There, the defendant was informed in writing of his *Miranda* rights, and he signed a written statement indicating his understanding and waiver of those rights. The court found that this evidence was sufficient to prove waiver, stating “[u]nder these circumstances, it is not critical that the testimony of a corroborating witness was not produced at trial.” *Id.* at 428 (emphasis added). In direct contrast to the circumstances in *Myers*, the prosecution did not introduce any written statement of understanding or waiver by Knokey. Under these circumstances, the State had the burden to corroborate Trooper

Belt's undocumented claim that Knokey waived his rights. *Davis*, 73 Wn.2d at 288; *Miranda*, 384 U.S. 475. The corroborating documentary evidence which met that burden in *Myers*, 77 Wn.2d at 427-28, is absent here. Since the burden imposed by *Miranda* was not met, Knokey's conviction should be reversed, and the case remanded for a new trial with all custodial statements excluded.

Moreover, there the totality of the circumstances shows that Knokey could not have knowingly, voluntarily, and intelligently waived his constitutional right. The admissibility of an Appellant's custodial statements to police is a question of due process under the Fourteenth Amendment. *Withrow v. Williams*, 507 U.S. 680, 688, 113 S. Ct. 1745, 1751, 123 L. Ed. 2d 407 (1993). The test is whether, considering the totality of the circumstances, the confession has been " 'made freely, voluntarily and without compulsion or inducement of any sort.' " *Haynes v. Washington*, 373 U.S. 503, 513, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963) (quoting *Wilson v. United States*, 162 U.S. 613, 623, 16 S. Ct. 895, 40 L. Ed. 1090 (1896)).

In the context of challenges to the admissibility of self-incriminating statements, Washington courts have said that the question on review is whether there is substantial evidence in the record from which the trial court could have found that the confession was voluntary by a preponderance of the

evidence. E.g., *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996); *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988); *State v. Cushing*, 68 Wn. App. 388, 393, 842 P.2d 1035 (1993). Washington courts have also said that the appellate court must conduct an independent review of the record in order to determine the voluntariness of the confession. E.g., *State v. Setzer*, 20 Wn. App. 46, 49, 579 P.2d 957 (1978). *State v. Broadaway* 133 Wn.2d 118, 942 P.2d 363 (1997).

It is well established that the State bears a heavy burden of proof in demonstrating that admissions made by a defendant were voluntary, and that the defendant knowingly and intelligently waived his self-incrimination rights. There is no presumption of in favor of any waiver of any constitutional right; rather, the federal and state case law instructs a reviewing court to indulge every reasonable presumption *against* waiver. *Miranda v. Arizona* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *State v. Riley*, 19 Wn. App. 289, 576 P.2d 1311 (1978).

While the terms “voluntarily, knowingly and intelligently” may appear to overlap in their meaning and significance, their common thrust is directed to the existence of free choice on appellant’s part; that is, a waiver without compulsion and by one mentally and physically capable of exercising his free choices. Specifically, the *Miranda* Court recognized that an accused

might not, by reason of physical or mental impairments, understand the warnings. *Miranda* requires interrogating officers to ascertain if the accused, knowing his rights, voluntarily relinquishes those rights.

In this case, the record is replete with proof that Knokey was injured, confused, frightened—possibly in shock from his injuries—and that he neither understood his rights nor voluntarily waived them. Knokey was questioned within three hours of a violent crash. Knokey suffered numerous injuries, including an injury to his head and a collapsed lung.

There are two tests of voluntariness: (1) the due process test, whether the statement was the product of police coercion; and (2) the *Miranda* test mentioned above, whether the appellant, who had been informed of his rights, thereafter knowingly and intelligently waived those rights. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991); *State v. Vannoy*, 25 Wn. App. 464, 467-69, 610 P.2d 380 (1980).

The test of voluntariness for due process purposes is “whether the behavior of the State’s law enforcement officials was such as to overbear petitioner’s will to resist and bring about confessions not freely determined—a question to be answered with complete disregard of whether or not petition in fact spoke the truth.” *Vannoy, supra* at 467 (quoting from *State v. Braun*, 82 Wn.2d 157, 161-62, 509 P.2d 742 (1973)).

The test of voluntariness for *Miranda* purposes places the heavy burden, discussed *supra*, upon the prosecution to establish Knokey was fully advised of his rights, understood them, and knowingly and intelligently waived them. *Miranda, supra; State v. Reuben, supra* at 625.

The evidence submitted during the CrR 3.5 hearing showed quite the contrary. Appellant was severely injured—he required hospitalization. He was determined to have a collapsed lung and head injuries, as well as other injuries. He had been in a devastating wreck three hours earlier. His friend was dead. These are factors that must be considered when determining whether an appellant knowingly, intelligently and voluntarily waived his rights. *State v. Cuzzetto*, 76 Wn.2d 378, 457 P.2d 204 (1969); *State v. Gardner*, 28 Wn. App. 721, 723, 626 P.2d 56, *review denied*, 95 Wn.2d 1027 (1981). Here, the evidence does not support a knowing, intelligent, and voluntary waiver, and reversal is merited under these circumstances.

VI. THE STATE OBTAINED A WARRANT TO SEARCH THE VEHICLE ON MARCH 27, 2002 WHEN THE VEHICLE WAS IMPOUNDED AND UNDER THE CONTROL OF LAW ENFORCEMENT. THE STATE WAS REQUIRED TO OBTAIN ANOTHER WARRANT TO CONDUCT A SUBSEQUENT SEARCH OF THE VEHICLE IN JUNE, 2004

The State obtained a warrant to search the car on or about March 27,

2002. Following the first trial, the State obtained “new” evidence from the car in June, 2004, but did not obtain a second warrant. Following the crash, the car was kept impounded in a fenced “Bullpen” controlled by the Washington State Patrol at all times. Defense counsel filed a motion to suppress evidence obtained as a result of the June, 2004 search on October 1, 2004. In the motion, defense counsel noted that the discovery provided to him did not include a proper inventory log and chain of custody for the items removed during the search. CP at 67-68.

The State argued below that because the vehicle was impounded, Knokey no longer had a reasonable expectation of privacy to the vehicle or its contents, and therefore the car was not “searched” within the contemplation of the Fourth Amendment and Washington Constitution. CP at 55-60.

The lower court erred in denying the motion to suppress evidence obtained as a result of the warrantless search. Article I, § 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” It is settled that Article I, § 7 is more protective than the Fourth Amendment, and a *Gunwall* analysis is not necessary. *State v. Vrieling*, 144 Wn.2d 489, 495, 28 P.3d 762 (2001) (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). The inquiry under Article I, § 7 is broader than under the Fourth

Amendment to the United States Constitution, and focuses on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). See also, *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217, 5 A.L.R.6th 685 (2003).

As a general rule, warrantless searches are per se unreasonable. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)). A few jealously guarded exceptions to the warrant requirement may justify a warrantless intrusion. *Ladson*, 138 Wn.2d at 349, 979 P.2d 833. The burden is always on the State to prove one of these narrow exceptions. *Id.* at 350. When seeking to justify a warrantless search, the State bears the heavy burden to prove the search falls within the exception. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

The Washington State Supreme Court has stated: "The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception." *Id.* at 357.

The State's initial search on March 27, 2002 was completed. Twenty-

six months passed before the June, 2004 search. The first search was clearly completed by that time. *Little v. Rhay*, 68 Wn.2d 353, 413 P.2d 15 (1966). See also, *State v. Patterson*, 8 Wn. App. 177, 504 P.2d 1197 (1973). The State has not demonstrated why the subsequent search should fall within a delineated warrant exception. Therefore, evidence obtained as a result of the search must be suppressed.

**III. THE TRIAL COURT ERRED IN FAILING TO
ENTER FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Findings of Fact and Conclusions of Law were not entered following the Criminal Rule 3.5 suppression hearing heard on December 15, 2003. CrR 3.5 requires the trial court to enter written findings of fact and conclusions of law with sections on undisputed facts, disputed facts, conclusions regarding disputed facts, and the conclusion and reasons regarding the admissibility of the defendant's statements. CrR 3.5(c); *State v. Miller*, 92 Wn.App. 693, 703, 964 P.2d 1196 (1998), review denied, 137 Wn.2d 1023, 980 P.2d 1282 (1999).

Criminal Rule 3.5(c) provides in relevant part:

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence; the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court

reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

...

(c) Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

...

In addition, Findings of Fact and Conclusions of Law were not entered following the Criminal Rule 3.6 suppression hearing heard on October 11, 2004.

CrR 3.6 provides:

(a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

Generally, a trial court's failure to comply is error, but such error is harmless if the court's oral findings are sufficient for appellate review.

Miller, 92 Wn. App. at 703, 964 P.2d 1196.

The Appellant submits that the failure to enter Findings and Conclusions in both instances constitutes error meriting remand for entry of written findings and conclusions. A court's oral opinion is not a finding of fact. *State v. Hescoek*, 98 Wn. App. 600, 989 P.2d 1251 (1999), *State v. Reynolds*, 80 Wn. App. 851, 860 n. 7, 912 P.2d 494 (1996) (citing *State v. Williamson*, 72 Wn. App. 619, 623, 866 P.2d 41 (1994)). Rather, the court's oral opinion is "no more than a verbal expression of [its] informal opinion at that time ... necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963). The trial court's oral decision is not binding "unless it is formally incorporated into Findings of Fact, Conclusions of Law, and Judgment." *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980) (citations omitted).

The Appellant recognizes that this is not a fatal defect and may be cured by entry of the proposed findings and conclusions. Even if filed after entry of this Brief, Washington case law provides a remedy short of reversal as long as long as the Appellant is not prejudiced and the State does not tailor the findings to meet the issues raised in Knokey's opening brief. *State v. Head*, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1998) (applying CrR 6.1(d)). Therefore, the Appellant concedes that if "untailored", post-brief filing of the

findings and conclusions may not merit reversal of the conviction.

In the absence of written findings and conclusions, however, the Appellant asserts that remand is the appropriate remedy, and submits that the same should be done in conjunction with the relief requested in the substantive arguments contained *supra and infra*.

IV. THE JURY INSTRUCTIONS RELIEVED THE STATE OF THE BURDEN OF PROVING THE CRIME AS CHARGED.

a. Vehicular Homicide and Proximate Cause

Washington's 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 in RCW 46.61.502;
- (2) Vehicular homicide is a class A felony punishable under chapter 9A.20 RCW....

RCW 46.61.520.

Prior to 1991 the courts interpreted the vehicular homicide statute to require a causal nexus between the defendant's intoxication and the injury. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989). The Legislature amended the statute in 1991, effectively removing this nonstatutory element.

State v. Salas, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995); *State v. Rivas*, 126 Wn.2d 443, 451, 896 P.2d 57 (1995).

Under RCW 46.641.520 an intoxicated defendant may still avoid responsibility for a death which results from his or her driving if the death is caused by a superseding, intervening event. In crimes which are defined to require specific conduct resulting in a specified result, the defendant's conduct must be the "legal" or "proximate" cause of the result.... Before criminal liability is imposed, the conduct of the defendant must be both (1) the actual cause, and (2) the "legal" or "proximate" cause of the result.

Rivas, 126 Wn.2d at 453.

These two necessary aspects of a "proximate cause" were articulated in the jury instructions of this case:

The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened. There may be more than one proximate cause of the death.

Instruction No. 8, CP at 109-113. Appendix A.

b. Instructions

When a statute provides that a crime may be committed in alternative ways or by alternative means, the information may charge one or all of the alternatives. When the information charges only one of the alternatives, however, it is error to instruct the jury that it may consider other ways or means by which the crime could have been committed, regardless of the

range of evidence admitted at trial. *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); *State v. Turner*, 103 Wn. App. 515, 13 P.3d 234 (2000) (state properly conceded error); *State v. Bray*, 52 Wn. App. 30, 33-34, 765 P.2d 1332 (1988).

Due process requires that the instructions be limited to the crime actually charged, not merely a crime that could have been charged. The instructions are the only way the jury can understand the charge at issue. The instructions may not go beyond the crime charged. *Severns, supra; Turner, supra; Bray, supra*; U.S. Const., Amend. VI, XIV, Const., Art. I, § 3.

Instruction No. 4 provides:

To convict the defendant of the crime of Vehicular Homicide, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (9) That on or about March 20, 2002, the defendant drove or operated a motor vehicle;
- (10) That the defendant's driving proximately caused injury to Richard Pinnell;
- (11) That at the time of causing the injury, the defendant was operating motor vehicle
 - (a) while under the influence of or affected by the use of intoxicating liquor and/or drugs;
or
 - (b) in a reckless manner;

or

(c) with disregard for the safety of others;

That the injured person died within three years as a proximate result of the injuries; and

That the acts occurred in Grays Harbor County, Washington.

CP at 10-113. Appendix A.

Instruction No. 4 explicitly permitted the jury to find Knokey guilty if his “driving” was “a” proximate cause of the accident. It went further, telling the jury, “there may be more than one proximate cause of a death.”

Although the law, in general, may permit a conviction when there is more than one proximate cause of death, the charge in this case did not. It required that the driving be “the” proximate cause, not merely “a” proximate cause. *Cf. State v. Roberts*, 142 Wn.2d 451, 509-13, 14 P.3d 713 (2000) (reversible error to instruct accomplice liability if defendant knew assistance would promote “a crime” instead of “the crime”); *State v. Cronin*, 142 Wn.2d 568, 578-80, 14 P.3d 752 (2000) (same).

The instructions, therefore, permitted Knokey to be convicted by proof of less than was charged, in violation of due process. It relieved the state of its burden of proving every element of the crime as charged, in violation of due process. U.S. Const., amend. 14; Const., Art. I, § 3.

c. **Counsel's Ineffectiveness Permits This Court to Review the Issue on Appeal.**

When counsel fails to object to, or even proposes, instructions that permit the defendant to be convicted of a crime other than that charged, counsel's performance is deficient. When counsel is ineffective, the defendant's challenge to the unconstitutional instructions is not precluded by the invited error doctrine.

Under the invited error doctrine, a defendant may not request that instructions be given to the jury and then complain upon appeal that the instructions are constitutionally infirm.... Here, however, defendant maintains that any error that occurred was the result of ineffectiveness of counsel and therefore the invited error doctrine does not apply. **Review is not precluded where invited error is the result of ineffectiveness of counsel....**

To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant.... We have held that the failure to object to an instruction which incorrectly sets out the elements of the crime with which the defendant is charged was deficient performance where the failure to object permitted the defendant to be convicted of a crime he or she could not have committed under facts presented by the State. *State v. Ermert*, 94 Wn.2d 839, 849-50, 621 P.2d 121 (1980). Similarly, defense counsel's failure to object to the instructions here, and his proposal of the same instructions as those given with respect to the child molestation counts involving L., may have resulted in Aho's conviction of a crime under a statute which did not apply to acts committed prior to July 1988. Counsel's performance was deficient.

Although legitimate trial strategy or tactics cannot be the basis for an ineffectiveness of counsel claim, ... there is

no conceivable legitimate tactic where the only possible effect of deficient performance was to allow the possibility of a conviction of a crime under a statute which did not exist and could not be applied during part of the charging period. Prejudice here is obvious.

State v. Aho, 137 Wn.2d 736-745-46, 975 P.2d 512 (1999) (emphases added, citations omitted). *Accord: State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358 (2000) (invited error doctrine does not preclude appellate review if based on ineffective assistance of counsel); *State v. Ermert, supra* (counsel ineffective where he failed to object to an instruction that incorrectly set out the elements of the offense with which his client was charged).

Counsel's proposed instructions included the offending language, as did the instructions proposed by the state. CP at 89-97. Counsel's performance in this case, therefore, was deficient. There was no tactical or strategic purpose for including this erroneous language. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Ermert, supra*; U.S. Const., Amend. VI, XIV; Const., Art. I, § 22.

d. Prejudice.

The prejudice of instructing in this language is apparent from this record. It permitted the jury to convict Knokey if it merely found the driving was "a" proximate cause. Since the state charged him with driving in a manner that was "the" proximate cause, the instruction is reversible error.

V. **UNDER WASHINGTON LAW, TO CONVICT A DRIVER OF VEHICULAR HOMICIDE AS A CONSEQUENCE OF BEING INTOXICATED, THE STATE MUST PROVE THAT THE INTOXICATED CONDITION OF THE DRIVER WAS A PROXIMATE CAUSE OF THE FATALITY**

Vehicular homicide is defined by RCW 46.61.520 as follows:

(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.

State v. MacMaster, 113 Wn.2d 226, 778 P.2d 1037 (1989) addresses the issue as to whether the State, in order to prove vehicular homicide by driving while intoxicated, must prove a causal connection between the fatality and the intoxicated condition of the driver. In *MacMaster* the court held:

A literal reading of the statute would not require that the influence of intoxicating liquor on the defendant be a proximate cause of the ensuing death. Nevertheless, to avoid a 'strict liability' result, this court and the Court of Appeals have engrafted on the statute, and have consistently held, that impairment due to alcohol must be a proximate cause of the fatal accident" *Id.*, at 231. [citing *State v. Engstrom*, 79 Wn.2d 469, 475, 487 P.2d 205 (1971); *State v. Giedd*, 43 Wn. App. 787, 719 P.2d 946 (1986); *State v. Gantt*, 38 Wn. App.

357, 684 P.2d 1385 (1984); *State v. Osborne*, 28 Wn. App. 111, 626 P.2d 980 (1980), *review denied*, 97 Wn.2d 1012 (1982); *State v. Fately* 18 Wn. App. 99, 566 P.2d 959 (1977); *State v. Mearns*, 7 Wn. App. 818, 502 P.2d 1228 (1972), *review denied*, 81 Wn.2d 1011 (1973).

In the case at bar, the State argued that Knokley was impaired, and that he had a BAC of .05 two and one half hours after the wreck, and that his blood alcohol could be extrapolated to be .08 or .09. RP at 782,790. The prosecution also argued that Knokey was affected by marijuana. RP at 782. Knokley submits, assuming *arguendo* that he was the driver, which he does not concede, that although there was evidence that he consumed alcohol prior to the accident, there is no showing that alcohol and/or marijuana was a proximate cause of the wreck. It is submitted that common experience indicates that traffic collisions causing serious injury and death unfortunately occur on a fairly regular basis. To convict an individual of vehicular homicide when there is no showing by the State that the fatal or injurious accident occurred due to, because of or as a proximate result of the fact that the driver was intoxicated would appear unduly harsh unless the fatality were proven to be a proximate result of reckless driving or driving in disregard for the safety of others. On the other hand, one can certainly envision situations, in which it would be clear that the intoxicated condition was a proximate cause of the accident. For example, the combination of either a very high

blood alcohol level and obvious signs of impairment or both and driving conduct which has no rational explanation other than intoxication. These elements are not present in the case in bar.

There is no way to determine whether the jury relied on the intoxication prong or the reckless driving prong in reaching its guilty verdict, nor is there way to know whether the jury would have convicted the AppelaInt had it been told that the intoxicated condition of the defendant had to be a proximate cause of the fatality under prong (a). As reasoned in *MacMaster, supra*, Instruction No. 4 in this case was prejudicial to Knokey since it certainly cannot be said that the error did not affect the outcome of the case.

VI. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE, AS A MATTER OF LAW, FOR THE COURT TO GIVE INSTRUCTION NO. 4 REGARDING THE COMMISSION OF VEHICULAR HOMICIDE AS A CONSEQUENCE OF CAUSING A DEATH WHILE DRIVING IN A RECKLESS MANNER.

The standard of review of the sufficiency of evidence to support a criminal conviction is set forth in *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). The critical inquiry is to evaluate whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could conclude that the essential elements of the crime have been established

beyond a reasonable doubt. *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1985); *State v. Robbins*, 68 Wn. App. 873, 846 P.2d 585 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Knowles*, 46 Wn. App. 426, 429, 730 P.2d 738 (1986).

In a vehicular homicide case in which Knokey is charged with violating more than one of the prongs, the jury need not be unanimous as to which prong was violated, but the State must produce substantial evidence of violation of each alternative. *State v. Miller*, 60 Wn. App. 767, 807 P.2d 893 (1991); *State v. Sanchez*, 42 Wn. App. 225, 232, 711 P.2d 1029 (1985). Unless there is sufficient evidence as to each means by which the defendant was alleged to have committed the crime, the verdict must be set aside. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). Sufficient evidence means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *Fately, supra*, at 102.

Here, the State argued not only that Knokey was the driver of the car, but that he was intoxicated at the time of the crash, and that the intoxication was a cause of the crash. The Appellant submits that the State presented insufficient evidence that Knokey was intoxicated, and that any level of

impairment was the proximate cause of the wreck.

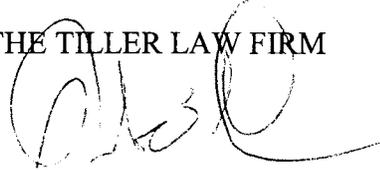
F. CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse his conviction and remand to the trial court with the direction that the charge be dismissed with prejudice.

DATED: May 24, 2006.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "P. B. Tiller", is written over a horizontal line.

PETER B. TILLER-WSBA 20835
Of Attorneys for Knokey

A

ORIGINAL
FILED
IN THE OFFICE
OF COUNTY CLERK
GRAYS HARBOR CO. WA

'05 JUL -5 A10 :28

CHEMYL CROWN
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RICKY LEE KNOKEY,

Defendant(s).

No: 03-1-390-8

054762

COURT'S INSTRUCTIONS TO THE JURY

INSTRUCTION NO. 1.

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly

COURT'S INSTRUCTIONS

1

293

significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it was wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2.

The defendant is charged with the crime of Vehicular Homicide.

A person commits the crime of Vehicular Homicide when the death of a person ensues within three years as a proximate result of injury proximately caused by the driving of a motor vehicle by the defendant and the defendant was driving a motor vehicle while under the influence of alcohol and/or any drug, was driving a motor vehicle recklessly, or was driving a motor vehicle with a disregard for the safety of others.

INSTRUCTION NO. 3.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4.

To convict the defendant of the crime of Vehicular Homicide, each of the following elements of the crime must be proved beyond a reasonable doubt:

- Y ~~(1)~~ That on or about March 20, 2002, the defendant drove or operated a motor vehicle;
- Y ~~(2)~~ That the defendant's driving proximately caused injury to Richard Pinell;
- Y ~~(3)~~ That at the time of causing the injury, the defendant was operating the motor vehicle
 - (a) while under the influence of or affected by the use of intoxicating liquor and/or drugs;
 - or
 - (b) in a reckless manner;
 - or
 - (c) with disregard for the safety of others;

4 ~~(A)~~

That the injured person died within three years as a proximate result of the injuries; and

4 ~~(B)~~

That the acts occurred in Grays Harbor County, Washington.

If you find from the evidence that elements (1), (2), (4), (5) and either (3)(a), (3)(b), or (3)(c) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Elements (3)(a), (3)(b) and (3)(c) are alternatives and only one need be proved. You need not agree as to which of the alternatives are proved in order to find the defendant guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 5.

A person is "under the influence of" or "affected by the use of" intoxicating liquor and/or drugs if the person's ability to drive a motor vehicle is lessened in any appreciable degree.

INSTRUCTION NO. 6.

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

INSTRUCTION NO. 7.

"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 minor oversights and inadvertencies encompassed within ordinary negligence. Ordinary negligence is the failure to exercise ordinary care. Ordinary negligence is the doing of some act that 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.

INSTRUCTION NO. 8.

To constitute Vehicular Homicide, there must be a causal connection between the death of a person and the criminal conduct of the defendant so that act done or omitted was a proximate cause of the resulting death.

The term "proximate cause" means a cause which, in direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened. There may be more than one proximate cause of the death.

INSTRUCTION NO. 9.

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which he or she has directly observed or perceived through the senses. Circumstantial evidence consists of proof of facts or circumstances which, according to common experience permit a reasonable inference that other facts existed or did not exist. The law makes no

distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 10.

A witness who has special training, education, or experience in a particular science, profession, or calling may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and the weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of that witness, the reasons given for his opinion, the sources of his information, together with the factors already given you for evaluation the testimony of any other witness.

INSTRUCTION NO. 11

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION No. 12

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreman. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty," according to the decision you reach.

You will also be furnished with a special verdict form. If you find the defendant not guilty do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach on each question contained in the special verdict form. In order to answer a special verdict form question "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The foreman will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

DATE: 7/5/05

J. Mark McCauley
JUDGE

FILED
COURT OF APPEALS

05 MAY 25 PM 12:05

CLERK OF COURT

BY _____

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RICKY L. KNOKEY,

Appellant.

COURT OF APPEALS NO.
33951-0-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Ricky L. Knokey, Appellant, and Andrea Vingo, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on May 24, 2006, at the Centralia, Washington post office addressed as follows:

Ms. Andrea Vingo
Grays Harbor County Prosecutor's Office
102 W. Broadway Ave., Room 102
Montesano, WA 98563-3621

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

CERTIFICATE OF
MAILING

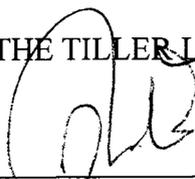
1

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE - P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828

Mr. Ricky Lee Knokey
DOC #884783
Cedar Creek Corrections Center
Post Office Box 37
Littlerock, WA 98556

Dated: May 24, 2006.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

CERTIFICATE OF
MAILING

2

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE – P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828