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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY JW DEPUTY

NO. 36881-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

DAVID W. THOMPSON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: Gerald R. Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

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RESPONDENT'S COUNTERSTATEMENT OF CASE

For purposes of the respondent's brief, given the issue raised by the defendant, the State accepts the statement of the case as presented by the defendant.

RESPONSE TO ASSIGNMENTS OF ERROR

The instructions, when read as a whole, properly instructed the jury concerning the law of the case.

Instruction No. 4 and Instruction No. 5 set forth the elements of Vehicular Homicide and Vehicular Assault. Those instructions are attached hereto and incorporated herein as Appendix 1. Each instruction properly informed the jury that one alternative means was operation of a motor vehicle by the defendant "with disregard for safety of others". That term was defined by the court in Instruction No. 6:

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. Operation in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences. 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 the Vehicular Homicide.

Unfortunately, through oversight, the last sentence of that instruction neglected to mention Vehicular Assault. Obviously, it was

meant to read “ordinary negligence in operating a motor vehicle does not render a person guilty of Vehicular Homicide or Vehicular Assault”.

The jury is presumed to read the trial court’s instructions as a whole in light of all other instructions. State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998) cert. denied, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999). These instructions, when read as a whole, properly informed the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The defendant cannot simply parse out a single instruction. In Re Benn, 134 Wn.2d 868, 922, 952 P.2d 116 (1998).

When read as a whole, Instructions 4 and 5 inform the jury that operation of a motor vehicle in disregard for the safety of others must be proven beyond a reasonable doubt in order to convict the defendant of either Vehicular Homicide or Vehicular Assault. They are also told that such disregard is a “most serious dereliction than ordinary negligence” and are told that “ordinary negligence is a failure to exercise ordinary care”. The term disregard for safety of others appears in each of the “to convict” instructions. The jury was told that disregard for the safety of others was more than “ordinary negligence”. It is apparent, under the circumstances, that the jury was not misled by this inadvertent error.

Once again, the law is clear. State v. Holt, 56 Wn.App. 99, 105-106, 783 P.2d 87 (1989):

A jury instruction does not deprive a defendant of a fair trial if the instructions, when read as a whole, correctly state the applicable law, are not misleading, and allow each side to present its arguments. State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979). "If instructions are such as are readily understood and not misleading to the ordinary mind, they are sufficiently clear". Foster, 91 Wn.2d 480.

The challenged instruction must be read in the context of all the instructions given. State v. Gerdts, 136 Wn.App. 720, 727, 150 P.3d 627 (2007). When this is done this court must find that the jury instructions were proper. The conviction must be affirmed.

DATED this 27 day of August, 2008.

Respectfully Submitted,

By: Gerald R Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/jfa

APPENDIX 1

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SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DAVID W. THOMPSON,

Defendant.

No: 07-1-00067-7

COURT'S INSTRUCTIONS

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 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.

COURT'S INSTRUCTIONS

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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, David Thompson, is charged with the crimes of Vehicular Homicide and Vehicular Assault.

A person commits the crime of Vehicular Homicide when he operates a motor vehicle while under the influence of any drug or operates a motor vehicle with disregard for the safety of others and thereby proximately causes the death of another person.

A person commits the crime of Vehicular Assault when he operates a motor vehicle while under the influence of any drug or operates a motor vehicle with disregard for the safety of others and proximately causes substantial bodily harm to another.

A separate crime has been charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION No. 3.

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

Mr. Thompson 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 David Thompson of the crime of Vehicular Homicide, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 10, 2007, the defendant, David Thompson, operated a motor vehicle;
- (2) That Mr. Thompson's operation of a motor vehicle proximately caused injury to Jo Ann Bollinger;
- (3) That at the time of causing the injury, the defendant was operating the motor vehicle;
 - (a) while under the influence of drugs, or
 - (b) with disregard for the safety of others;
- (4) Jo Ann Bollinger died as a proximate result of the injuries;
- (5) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (4) and (5), and either (3)(a) or (3)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives, (3)(a) or (3)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements (1) (2) (3) (4) or (5), then it will be your duty to return a verdict of not guilty.

INSTRUCTION No. 5.

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

- (1) That on or about January 10, 2007, David Thompson operated a vehicle;
- (2) That the defendant's operation of the motor vehicle proximately caused substantial bodily harm to Charles Jenkins;
- (3) That at the time David Thompson;
 - (a) was under the influence of drugs, or
 - (b) operated the vehicle with a disregard for the safety of others;
- (4) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), and (4) and either of the alternative elements, (3)(a) or (3)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which alternative has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements (1), (2), (3) or (4), then it will be your duty to return a verdict of not guilty.

INSTRUCTION No. 6.

A person is under the influence or affected by the use of drugs when that person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of the drug.

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. Operation in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences. 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 the Vehicular Homicide.

INSTRUCTION No. 7.

Bodily injury means physical pain or injury or impairment of physical condition.

Substantial bodily harm means bodily injury which involves a temporary but substantial disfigurement or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

INSTRUCTION No. 8.

To constitute vehicular homicide, there must be a causal connection between the death of a human being and the driving of a defendant so that the act done was a proximate cause of the resulting death.

To constitute vehicular assault, there must be a causal connection between the substantial bodily harm to a person and the driving of a defendant so that the act done was a proximate cause of the substantial bodily harm.

The "term proximate cause" means a cause which, in a direct sequence, produces the death or substantial bodily harm and without which the death or substantial bodily harm would not have happened.

There may be more than one proximate cause.

INSTRUCTION No. 9.

If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death of Jo Ann Bollinger, it is not a defense that the conduct of Ms. Bollinger may have also been a proximate cause of her death.

However, if a proximate cause of death was a new independent intervening act of the deceiver which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's act has been committed or begun.

However, if in the exercise of ordinary care, the defendant should have reasonably anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant should have reasonably anticipated.

INSTRUCTION No. 10.

If are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of substantial bodily harm to Charles Jenkins, it is not a defense that the conduct of Charles Jenkins may also have been a proximate cause of substantial bodily harm to him.

However, if a proximate cause of substantial bodily harm was a new independent intervening act of the injured person which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the substantial bodily harm. An intervening cause is an action that actively operates to produce harm to another after the defendant's act has been committed or begun.

However, if in the exercise of ordinary care, the defendant should have reasonably anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the substantial bodily harm fall within the general field of danger which the defendant should have reasonably anticipated.

INSTRUCTION No. 11.

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. 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. 12.

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 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 the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION No. 13.

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION No. 14.

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

INSTRUCTION No. 15.

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 for each count.

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

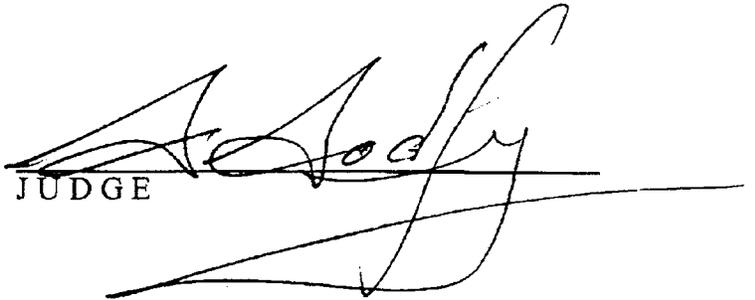
You will also be furnished with a special verdict form as to each count charged. If you find the defendant not guilty of a particular count do not use the special verdict form corresponding to that count. If you find the defendant guilty, you will then use the special verdict form and fill in the blank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

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

DATE:

Sept 26, 47

JUDGE



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

DAVID W. THOMPSON,

Appellant.

No.: 36881-1-II

DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 27th day of August, 2008, I mailed a copy of the BRIEF OF
RESPONDENT to CHRISTOPHER GIBSON; NIELSEN, BROMAN & KOCH; 1908 E.
MADISON STREET; SEATTLE, WA 98122 and to DAVID W. THOMPSON 260913;
STAFFORD CREEK CORRECTIONS CENTER; 191 CONSTANTINE WAY; ABERDEEN,
WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the
foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman