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Court of Appeals
Division II
State of Washington

No. 95947-1

NO. 49231-8-II

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

STATE OF WASHINGTON, Respondent

v.

JOSHUA CANE FRAHM, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-02522-0

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. The evidence was sufficient to support Frahm's conviction for Vehicular Homicide.

II. The evidence was sufficient to support Frahm's conviction for Conspiracy to Commit Perjury in the First Degree.

III. Frahm cannot establish that he was denied effective assistance of counsel.

IV. The State does not intend to seek a cost bill.

STATEMENT OF THE CASE

The State charged Joshua C. Frahm (hereafter 'Frahm') with Vehicular Homicide under both the driving under the influence and recklessness prongs; Manslaughter in the First Degree; Vehicular Assault under both the driving under the influence and recklessness prongs; Hit and Run – Injury; False Reporting; and Conspiracy to Commit Perjury in the First Degree for an incident that occurred on December 7, 2014. CP 21-23.

Frahm went to trial on the above listed charges on May 9, 2016. RP 110. The State presented testimony from twenty-nine witnesses. RP 167-1,253. Testimony from the State's witnesses established that on December 7, 2014 Steven Klase was driving northbound in his 2006 Honda CRV on I-205 near the Burton Road overpass sometime before

5:50 AM. RP 169-71, 173, 248-49. Mr. Klase was in the far right of three lanes when he saw headlights in his rear view mirror, was struck from behind by another vehicle, spun out of control across all the lanes of traffic, and crashed into the concrete barrier on the left side of the road. RP 249, 268. His vehicle rotated off the barrier and the passenger side of his vehicle faced the lanes of travel. RP 347. After the initial crash, Mr. Klase heard a male's voice but doesn't remember what was said. RP 251-52.

That male's voice was from James Irvine who had parked his vehicle on the right shoulder of the highway, activated his emergency flashers, and went over to Mr. Klase's driver side door to render aid. RP 271, 457, 453. At 5:54 AM Mr. Irvine called 911 to report the collision between Frahm and Mr. Klase. RP 355. He observed a white pickup truck rear end Mr. Klase and leave the scene. RP 355-56. While on the phone with 911 Mr. Irvine said "oh, no" and the 911 call ended. RP 356.

At approximately the same time, Mr. Dela Cruz-Moreno was driving his Honda Odyssey on I-205 at around 50-55 MPH when he came upon Mr. Irvine's vehicle parked on the right shoulder of the road. RP 453, 484. Mr. Cruz-Moreno was traveling in either the center or far left lane of travel at this time, and moved to the left hand lane to avoid Mr. Irvine's car. RP 453, 457, 497-98. He then saw Mr. Klase's CRV blocking the left hand lane and part of the center lane of travel. RP 348, 458-59. He

braked and swerved to the left, but struck Mr. Klase's CRV on the passenger side door. RP 283, 348, 486. Mr. Irvine was then hit by the CRV and was found by law enforcement officers lying in the right hand lane 20 feet from Mr. Klase's CRV, face down and bleeding from his face and head. RP 173-74, 285-86. Mr. Irvine suffered serious head, brain, and spinal injuries from the collision. RP 884-888. He ultimately passed away from pneumonia brought on by these injuries. RP 889.

At 5:47 AM on December 7, 2014 Ryan Lockhart called 911 to report a white Ford pickup truck traveling erratically on eastbound SR-14. RP 352. The truck cut him off at the I-5 north on-ramp onto SR-14. RP 401. He saw the truck almost hit the center divider and cross the center lane three times. RP 352. He also saw the truck weaving within its lane, drifting over the right hand side, and almost rear end another vehicle. RP 402-3. The white truck ultimately sped off and he lost sight of it at the Evergreen Blvd. flyover. RP 403. He noted the driver was wearing a ball cap and a flannel shirt and was the only person in the truck. RP 404.

At 5:48 AM James Barlow called 911 to report a drunk driver on SR-14 where I-5 merges onto SR-14. RP 354, 423. He observed a white Ford F150 truck jerk into his lane directly behind him and then back into another lane. RP 423. He saw the truck driving all over the road and almost rear end other cars. RP 354, 424. He saw part of the truck's license

plate, "B7." RP 354-55. He observed the truck driving on SR-14 until it got onto I-205. RP 426-27.

At around 2:30 PM on December 7, 2014 Clark County Sheriff's Deputies were dispatched to a report of a stolen vehicle. RP 699. They responded to 5212 NE 48th St in Clark County, WA, the address of Frahm's sister, Alena Frahm. RP 600, 700. Frahm had called 911 to report that his white Ford F150 had been stolen. RP 702-03. He alleged that he left his truck on the street the night before, with the doors unlocked, and that his mother called him at noon to say the truck was stolen. RP 705. Frahm was arrested on an unrelated warrant at this time, and a Ford key was found in his pocket when he was searched. RP 719.

Sometime in the early morning, near dawn, of December 7, 2014 Malachi Currie-Spalding was sleeping on the couch when he was awoken by lights from a white truck parking in the front yard of his home. RP 535-37. He then saw an adult man walk away from the truck. RP 539. The apartments were located at 12313 NE 41st St in Clark County, WA, less than one mile from I-205. RP 556, 558. Derek Currie, Malachi's father, called 911 at 2:11 PM that day to report the truck in the front yard. RP 564-65. Mr. Currie knew Frahm as an acquaintance, and Frahm had been to Mr. Currie's home on at least one prior occasion. RP 582-888. He found Frahm's ID inside of the truck. RP 582. The white truck had license plate

"B78006Z" and was registered to Frahm. RP 361, 363-64. There was contact damage on the front of the truck that included black markings from the spare tire on Mr. Klase's CRV. RP 367, 369.

On December 6, 2014 Allison Morton ran into Frahm at the Q club in downtown Vancouver at around 10:30 PM. RP 921-23. She spoke and danced with Frahm, and saw him drinking what appeared to be rum and Coke alcoholic beverages. RP 927, 929. She also saw Frahm become drunk while at the club, and Ms. Morton was drunk as well. RP 928, 931. The club closed at 2 AM, Frahm drove Ms. Morton in his white truck to an after-hours club in Portland, Oregon. RP 931-32. At the after-hours club, Ms. Morton danced and drank with Frahm. RP 933. Later in the evening, Frahm drove Ms. Morton in his white truck to her apartment in downtown Vancouver. RP 919, 936. Frahm parked in her parking spot and entered the elevator to her second floor apartment. RP 919, 937. They both drank vodka in Ms. Morton's apartment that Frahm brought with him. RP 938. Ms. Morton noticed that Frahm was very intoxicated, was stumbling, and looked as though he was about to fall. RP 940, 956. Ms. Morton was also very intoxicated. RP 956. Frahm and Ms. Morton began to engage in sexual activity, but they did not have sexual intercourse. RP 941-42. Ms. Morton told Frahm that they could not have intercourse because Frahm

was having difficulties performing, so he left the apartment. RP 942-43, 946..

Video cameras at Ms. Morton's apartment complex recorded Frahm and Ms. Morton arriving at Ms. Morton's apartment at around 4:10 AM and then entering her complex at 4:20 AM. RP 642-44, 667, 951. Videos also captured Frahm leaving the apartment in his truck at 5:40 AM and heading east. RP 646-47, 669-70, 953-54. Videos from the Hilton Hotel in downtown Vancouver near Ms. Morton's apartment showed Frahm's truck driving on the sidewalk on December 7, 2014 at around 5:41, 5:42 AM. RP 653-55, 676.

Physical evidence from Frahm's truck was collected and analyzed, including pieces of the truck and DNA from the deployed airbag. RP 814-16. This evidence was compared with evidence at the crash scene, which established physical matches between Frahm's truck and debris from the scene. RP 859-877. The DNA sample from the deployed airbag in Frahm's truck was compared with DNA taken directly from Frahm. RP 1048-49, 1053-1055. The DNA taken from the airbag definitively matched Frahm's DNA. RP 1056-1057. The only definitive DNA sample on the steering wheel also matched Frahm. RP 1061. Paint chips taken from the scene of the accident and Frahm's truck were also analyzed, and the two

sets of paint chips were proven to both be from Frahm's truck. RP 1072-1076.

On December 11, 2014, detectives accessed Frahm's phone records for December 6 and 7, 2014. RP 1137, 1147. The phone records showed that Frahm used his phone at the Quarterdeck bar in Vancouver, WA from 11:01 PM to 11:40 PM on December 6, 2014. RP 1150. He then used his phone in downtown Vancouver near the Q club from around 11:43 PM on December 6, 2014 until 2:00 AM on December 7, 2014. RP 1151-52. The next use of his phone occurred at 2:04 AM on December 7, 2014 in Portland, Oregon and it was used in Portland at 2:58 AM. RP 1152-53. Frahm's phone was then used between 4:07 AM and 6:14 AM in downtown Vancouver that same morning. RP 1153-54.

The event data recorder from Frahm's vehicle was also downloaded and analyzed by detectives after the crash. RP 1206-07. The event recorder provided information for 20 seconds before the collision and 5 seconds after. RP 1207. The data showed that Frahm's truck was traveling 85 MPH when it struck Mr. Klase's vehicle. RP 1216. The 5 second after-crash recording indicated that Frahm's speed dropped from 73 MPH to 66 MPH, but it never stopped. RP 1217. Frahm activated his brakes two-tenths of a second before the airbag deployed and only stayed

on for 1.4 seconds after the collision. RP 1217. Frahm then pressed on the accelerator 2.2 seconds after the collision. RP 1218-19.

On December 7, 2014 at 4:40 PM, four Washington State Patrol detectives interviewed Frahm at the Clark County Jail where Frahm was in custody on an unrelated warrant. RP 755-56. At this time one of the detectives noticed an injury on Frahm's left arm that was consistent with an airbag deployment. RP 1128, 1131-1133. Frahm agreed to the interview, and during the trial the approximately hour long video interview was played in its entirety. RP 753-55. During the interview, Frahm claimed to have stayed at his sister's house all night on December 6, 2014, and woke up to find his truck gone at noon of December 7, 2016. RP 766-70. Detectives confronted Frahm with evidence they had collected and were going to collect, including cell phone records, DNA from the airbag, and statements made by Alena Frahm. RP 774-77. Frahm then admitted to having gone to the Quarterdeck bar, but was back at his sister's house for the rest of the night by 12:00 or 12:30 AM. RP 777, 799. Detectives told Frahm that his story did not did not add up. RP 776. The detectives then had several exchanges where they told Frahm they thought he was lying, and Frahm denied his involvement:

> Brusseau: The point is you've been lying to us. We know you're lying because your family told us you were lying to us. And then we also know it because all the stuff that's on

tape at the Quarterdeck and all of our other witnesses…So I guess the point is – you should know well enough by now that we know you're lying to us, right?

Frahm: I did go out last night.

RP 778.

Brusseau: Do you want to take a second and think about it and maybe tell us the truth this time?

Frahm: You know, I'll tell you. I really did go out last night. But I did go home afterwards and I did park my truck and it did turn out missing.

But I did go out for a little bit. I guess I went to – I didn't want you guys to take that and like overplay that as (inaudible), so I left that part out… I just didn't want you to know that I was out at a bar, you know what I mean?

RP 781.

Ortner: Whose DNA do you think's going to be on this air bag?

Frahm: I don't know. It's not mine. I promise you that.

Ortner: Okay, and why? Why do you think it's not yours?

Frahm: Because I didn't get into that wreck. I didn't get in a wreck. My ID and stuff was in the car when you guys found it.

RP 784.

Ortner: So your cell phone (inaudible) is going to go from the Quarterdeck to your sister's house? Nowhere else?

Frahm: Yeah. Check that phone. There's – I didn't go anywhere else.

RP 790.

> Brusseau: That's what the rest of the crash looked like after you left, so how does that look? (Inaudible) involved in one of those?
>
> Frahm: That looks really bad.
>
> Brusseau: Yeah.
>
> Frahm: But I didn't leave because I wasn't there.

RP 792.

Another witness named Dusty Nielsen was interviewed by several detectives on February 23, 2015. RP 1235. During the interview, Mr. Nielsen provided detectives with a card containing the name of the Q nightclub and an address with Frahm's attorney's name and phone number. RP 1235, 1309-10. Mr. Nielsen testified that he met Frahm in the Clark County Jail sometime after the incident date of this case. RP 1254. He also testified that Frahm had proclaimed his innocence to him, and that Frahm was not the driver of the truck. RP 1256-57. Mr. Nielsen was convinced of Frahm's innocence and agreed to be an alibi witness for Frahm. RP 1259-60. Frahm gave him information and details about going to bars, what Frahm's truck interior was like during the night in question, and that Frahm had gone to a woman's apartment for sex. RP 1260-63. Mr. Nielsen claimed that becoming the alibi was his idea, but that Frahm was aware of it. RP 1264. Frahm provided Mr. Nielsen with a card with Frahm's attorney's information. RP 1265. After getting out of custody,

Mr. Nielsen gave a statement to detectives on February 23, 2015. RP 1286-87, 1298. Nielsen gave his false alibi to detectives, who subsequently showed him evidence to disprove the alibi. RP 1287-90. Mr. Nielsen then recanted his alibi, but claimed that it was not a lie that it was his idea to make the false statement. RP 1291. He also stated that it was only himself and Frahm who talked about his alibi story. RP 1317.

At the close of the State's case at trial Frahm made a motion to dismiss the Vehicular Homicide and Manslaughter charges. RP 1336. The trial court granted the motion to dismiss on the Manslaughter charge, but denied it on the Vehicular Homicide charge. RP 1396. The jury returned guilty verdicts on the five remaining charges. RP 1606-07; CP 219-25. This timely appeal followed. CP 267.

ARGUMENT

I. There was sufficient evidence to support Frahm's conviction for Vehicular Homicide.

Frahm claims that substantial evidence does not support his conviction for Vehicular Homicide because Mr. Irvine's death was not proximately caused by Frahm's driving. Frahm argues that Mr. Irvine's actions were not reasonably foreseeable and are therefore independent acts breaking the causal chain between his death and Frahm's driving. However, Mr. Irvine's actions were not negligent, and even if they were,

they were reasonably foreseeable. Therefore his death was proximately caused by Frahm's driving. Frahm's claim fails.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A conviction for Vehicular Homicide requires proof of a causal link between a defendant's misconduct and the accident which results in another's death. *State v. Gantt*, 38 Wn. App. 357, 359, 684 P.2d 1385 (1984) (citing *State v. Nerison*, 28 Wn. App. 659, 625 P.2d 735, *review*

denied, 95 Wn.2d 1024 (1981)). RCW 46.61.520 mandates that the deceased's death be the proximate result of injury proximately caused by the driving of the defendant. "Proximate cause is a cause which in direct sequence, unbroken by any new, independent cause, produces the event complained of and without which the injury would not have happened." *State v. Decker*, 127 Wn. App. 427, 432, 111 P.3d 286 (2011) (quoting *Gantt*, 38 Wn. App. at 359).

Contributory negligence of the deceased is not a defense to Vehicular Homicide, however the causal chain may be broken if the death was caused by a superseding intervening event. *State v. Roggenkamp*, 115 Wn. App. 927, 945, 64 P.3d 92 (2003), *affirmed*, 153 Wn.2d 614, 630-31, 106 P.3d 196 (2005) (citing *State v. Judge*, 100 Wn.2d 706, 718, 675 P.2d 219 (1984) and *State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57 (1995)). For a deceased's actions to relieve a defendant of liability, "the defendant must show that the deceased's contributory negligence was a supervening cause without which the defendant's contributory negligence would not have caused the" death. *State v. Souther*, 100 Wn. App. 701, 709, 988 P.2d 350 (2000) (citing *Judge*, 100 Wn.2d at 718).

"Negligence is the failure to exercise ordinary care." WPIC 10.01; *Mathis v. Ammons*, 84 Wn.App. 411, 415–16, 928 P.2d 431 (1996) (internal citations omitted). It is the doing of an act that a reasonably

careful person would not have done under the same or similar circumstances, or it is the failure to do an act that a reasonably careful person would have done under the same or similar circumstances. WPIC 10.01; *System Tank Lines v. Dixon*, 47 Wn.2d 147, 286 P.2d 704 (1955) (internal citations omitted). Contributory negligence occurs if a person fails to exercise the reasonable care for his or her own safety that a reasonable person would have used under the existing facts or circumstances, and if so, the injured person's conduct must also be a legally contributing cause of his or her injury. *Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180, 182, 412 P.2d 109 (1966) (internal citations omitted).

A superseding cause that is sufficient enough to relieve a defendant from liability must be one that is not reasonably foreseeable. *Roggenkamp*, 115 Wn. App. at 945 (citing *Crowe v. Gaston,* 134 Wn.2d 509, 519, 951 P.2d 1118 (1998)); *Micro Enhancement International v. Coopers & Lybrand, LLP,* 110 Wn. App. 412, 431, 40 P.3d 1206 (2002). The causal chain between the defendant's driving and the deceased's death is broken by a superseding cause when the intervening act is one which the defendant should not have anticipated as reasonably likely to happen. *Roggenkamp*, 115 Wn. App. at 945-46 (citing *State v. McAllister*, 60 Wn. App. 654, 660, 806 P.2d 772 (1991)).

For Frahm to prevail on his claim, the evidence must establish that: (1) Mr. Irvine was negligent; and (2) Mr. Irvine's negligence was not reasonably foreseeable. However when viewing the evidence in the light most favorable to the State, Frahm's claim fails. The casual chain between Frahm's driving and Mr. Irvine's death can only be broken if Mr. Irvine was contributorily negligent to the point that without that negligence, Frahm's own negligence would not have caused the death. *Souther*, 100 Wn. App. at 709. Therefore, there must be evidence that Mr. Irvine was contributorily negligent.

When viewing the evidence in the light most favorable to the State, Mr. Irvine was not negligent. Mr. Irvine was driving his vehicle behind Frahm's white truck and witnessed Frahm strike Mr. Klase's CRV and flee the scene. RP 355. He immediately stopped at the scene, parked on the right shoulder, and activated his emergency flashers. RP 271, 457, 453. He exited his vehicle to render aid to Mr. Klase, and only moments later was struck, and ultimately killed, by the second collision of Mr. Klase's CRV. RP 173-74, 285-86, 356.

The actions taken by Mr. Irvine immediately after witnessing the defendant commit a hit and run did not demonstrate a failure to exercise the reasonable care for his own safety that a reasonable person would have used in the same situation. *Dixon*, 47 Wn.2d at 286. In fact, his actions are

of the type shielded against civil liability. Rendering aid by a Good Samaritan is something that has been long been protected under Washington law. *State v. Hillman*, 66 Wn. App. 770, 776, 832 P.2d 1369 (1992). RCW 4.24.300 provides immunity against civil liability for people who render emergency care at the scene of an emergency, unless they commit gross negligence or willful or wanton misconduct. *Id.* While that statute contemplates limiting liability from harm caused by the Good Samaritan to the original victim, the underlying principles behind the statute are to prevent bystanders from withholding aid to an injured person. *Id.* (citing *State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977)).

Here, Mr. Irvine was attempting to render emergency aid to Mr. Klase when he was hit by Mr. Klase's car in the second collision. He was not an emergency aid worker, but was a concerned citizen who had just observed a major traffic crash. He saw Frahm's truck flee the scene, and being the nearest vehicle to the scene stopped to render aid. The actions taken by Mr. Irvine are those which the State has determined are not negligent in the context of civil liability, and as such, should not be considered as a source of contributory negligence in the present case. Taking every inference in favor of the State, the evidence establishes that Mr. Irvine was not negligent. Therefore the causal chain between Frahm's driving and Mr. Irvine's death has not been broken.

Even if Mr. Irvine's actions could be considered as contributory negligence, the evidence is still sufficient to support the conclusion that his actions were reasonably foreseeable under the circumstances. Taking every reasonable inference in favor of the State, the evidence again shows that Mr. Irvine's actions in stopping to render aid to a disabled motorist are reasonably foreseeable under the circumstances. Mr. Irvine's actions are those that a defendant in Frahm's position, who has committed a hit and run and left the other vehicle stranded in the lanes of travel, should have anticipated as reasonably likely to happen. *Roggenkamp*, 115 Wn. App. at 945-46 (citing *McAllister*, 60 Wn. App. at 660).

Mr. Irvine's actions were not a superseding intervening event that breaks the causal chain between Frahm's driving and Mr. Irvine's death. When looking at cases dealing with superseding intervening events, Mr. Irvine's actions fall squarely in the realm of a foreseeable event.

In *Roggenkamp*, the defendant was driving down a two lane road at 70 MPH in a 35 MPH zone when he moved into the left lane to pass his friend driving in front of him. *Id.* at 933. Another car driven by JoAnn Carpenter turned left onto the road that Roggenkamp was driving down. *Id.* Roggenkamp was unable to stop in time and crashed into Carpenter's car. *Id.* The crash killed a passenger in Carpenter's car, and Carpenter and another passenger were seriously injured. *Id.* It was later determined that

Carpenter had a blood alcohol concentration of 0.13 at the time of the crash. *Id.* at 934. The facts in that case established that a driver in Carpenter's position using reasonable caution should have seen Roggenkamp approaching, and that it was not safe to pull out onto the road. *Id.* at 944-45. The Court held that a driver pulling out into the road, whether intoxicated or not, should have been reasonably foreseeable to a driver in Roggenkamp's position. *Id.* at 946. Carpenter's actions were not a superseding intervening event, and the evidence supported the conclusion that Roggenkamp's actions were the proximate cause of the accident. *Id.* at 947.

In the present case, Mr. Irvine's actions are just as foreseeable as Carpenter's in *Roggenkamp*. A car turning onto a road is a normal occurrence that someone driving down the road should foresee. Here, someone stopping to help a victim of a major hit and run crash is an occurrence that the person who caused the crash and ran from the scene should foresee. This is a reasonable inference from the evidence presented at the trial. Furthermore, unlike Carpenter in *Roggenkamp*, who was intoxicated and should have seen the defendant's car approaching, Mr. Irvine was not negligent in stopping to help Mr. Klase. The Court in *Roggenkamp* held that this contributory negligence from Carpenter did not break the causal chain, so Mr. Irvine's lack of negligence in the present

case, as argued above, further strengthens the inference that his actions should have been foreseeable to Frahm. *Id.* at 946-47.

Because Mr. Irvine's actions in rendering aid at the scene were not negligent and were reasonably foreseeable, substantial evidence supports Frahm's Vehicular Homicide conviction. His claim fails.

II. There was sufficient evidence to support Frahm's conviction for Conspiracy to Commit Perjury in the First Degree.

Frahm claims that substantial evidence does not support his conviction for Conspiracy to Commit Perjury in the First Degree, because the State failed to prove the agreement prong of conspiracy. Frahm argues that the testimony at trial from Mr. Nielsen established that it was solely his idea to lie to the officers, and that Frahm never encouraged him to do so. However, there was substantial evidence presented at trial to support the conclusion that there was an agreement between Frahm and Mr. Nielsen. The specific information given by Mr. Nielsen to Frahm and then relayed to officers is sufficient evidence of an agreement. Frahm's claim fails.

As stated above, the State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. at 362-65; *Colquitt*, 133 Wn.App. at 796. When the sufficiency of the

evidence to support a verdict is challenged the inquiry is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, while viewing the evidence in the light most favorable to the State. *Roggenkamp*, 115 Wn. App. at 942-43 (citing *State v. Lovelace*, 77 Wn. App. 916, 919, 895 P.2d 10 (1995)). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *Delmarter*, 94 Wn.2d at 638. "[S]pecific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993) (quoting *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991)). A reviewing court defers to the trier of fact to resolve issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence. *State v. Stark*, 158 Wn. App. 952, 961, 244 P.3d 433 (2010) (citing *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985))).

A person commits the crime of conspiracy if, with the intent to commit a crime, "he or she agrees with one or more persons to engage in or cause the performance of such [criminal] conduct, and any of the persons takes a substantial step in pursuance of such agreement." RCW 9A.28.040(1).

The State is required to prove an actual agreement with at least one other person, however the proof need not be of a formal agreement. *Stark*, 158 Wn. App. at 962 (citing *State v. Pacheco*, 125 Wn.2d 150, 159, 882 P.2d 183 (1994) and *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669 (1997)). An agreement may be proved by overt acts. *State v. Smith*, 65 Wn. App. 468, 473, 828 P.2d 654 (1992) (citing *State v. Casarez-Gastelium*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)). All the law requires is evidence supporting an understanding between the parties, not necessarily an explicit or formal agreement. *State v. Israel*, 113 Wn. App. 243, 285, 54 P.3d 1218 (2002) (citing *Smith*, 65 Wn.App. at 471).

When reviewing the evidence in the present case in the light most favorable to the State, there was sufficient evidence of an agreement to commit perjury between Frahm and Mr. Nielsen. While there was no evidence of a formal agreement, such formality is not required. *Stark*, 158 Wn. App. at 962. The evidence presented to the jury here was circumstantial evidence of an agreement, and such circumstantial evidence is just as reliable as direct evidence in a sufficiency of the evidence claim. *Delmarter*, 94 Wn.2d at 638.

The evidence at trial showed that Mr. Nielsen had met Frahm for the first time after December 14, 2014 while they were both in jail. RP 1254. Mr. Nielsen claimed that he was persuaded of Frahm's innocence

after speaking with him. RP 1256-57. Mr. Nielsen further claimed that it was his idea to give a false alibi to the police, but that Frahm was only aware of it. RP 1264. However, he did admit that it was only himself and Frahm who had talked about his alibi story. RP 1317. Frahm provided Mr. Nielsen with information and details about going to bars, what Frahn's truck interior was like during the night in question, and that Frahm had gone to a woman's apartment for sex. RP 1260-63. Furthermore, Mr. Nielsen gave detectives a card with the name of the Q nightclub and an address with Frahm's attorney's name and phone number. RP 1235, 1309-10. Mr. Nielsen then presented his false story to detectives, who pressed him on details, ultimately causing him to admit his alibi was a lie.

This reasonable inference from this evidence establishes that Frahm and Mr. Nielsen had an agreement for Mr. Nielsen to commit perjury on behalf of Frahm. It is not a reasonable, or even logical, inference that Mr. Nielsen would knowingly lie to police officers simply out of the goodness of his heart, all for someone he just met while in jail. The more reasonable inference is that Frahm and Mr. Nielsen reached some kind of agreement to lie to the officers for Frahm. This inference is further strengthened by the evidence that Frahm actively aided Mr. Nielsen in his perjurious mission by giving Mr. Nielsen specific details to establish an alibi. RP 1235, 1260-63, 1309-10. Thus, there was sufficient

evidence for a rational jury to find Frahm guilty of conspiracy to commit perjury beyond a reasonable doubt.

The evidence of an agreement in the present case is similar to sufficient evidence found in past cases. In *Israel*, the defendant was convicted of conspiracy to commit robbery in the first degree for purchasing items for his pawnshop that had been stolen through a string of robberies. 113 Wn.App. at 252-53. The State did not present direct evidence of an agreement, but did present testimony that: the defendant was told the jewelry he bought was from a robbery; the defendant asked for "high ticket" items likely to be found on someone's person; the defendant told the persons committing the robberies that the police would not find out if they brought him jewelry; and that the defendant had given tips on places to rob. *Id.* at 284-85. The Court held that this evidence was sufficient to establish an agreement because there was an understanding between the involved parties. *Id.* at 285. The Court also held that testimony that the defendant had given a tip on where to commit a robbery was evidence that the jury could reasonably use to conclude that the defendant had provided directions knowing that the a robbery would be committed. *Id.* at 286.

Here, there was also evidence that Frahm supported Mr. Irvine in committing perjury. Frahm was the only person to give Mr. Irvine specific

information to establish an alibi, and the logical inference from this evidence is that Frahm had an understanding with Mr. Nielsen to commit perjury. This is similar to *Israel*, because just as in that case, there was no formal agreement between the parties but the actions of each party demonstrated an understanding to undertake a criminal enterprise; robbery in *Israel* and perjury here. *Id.* at 285. Furthermore, Frahm gave directions to Mr. Nielsen, in the form of specific details and a card with pertinent information for the alibi, and Mr. Nielsen used those directions to commit perjury. RP 1235, 1260-63, 1309-10. This is also similar to *Israel*, because it was reasonable for the jury in that case to conclude the tip on where to rob was evidence of a conspiracy. 113 Wn. App. at 286. Here, it is reasonable that a jury could conclude that Frahm's directions on how to commit perjury were evidence of the agreement to conspire to commit perjury.

Evidence was presented that Frahm provided Mr. Nielsen with details to create a false alibi, and he understood that Mr. Nielsen was going to commit perjury by giving police officers the false alibi. Taking all reasonable inferences from this evidence in favor of the State, sufficient evidence exists of an agreement to conspire to commit perjury in the first degree. Frahm's claim fails.

III. Frahm cannot establish that he was denied effective assistance of counsel.

Frahm claims that he was denied effective assistance of counsel when his attorney at trial failed to object to the playing of a recorded interrogation of Frahm. Frahm argues that the recording included statements by the detectives calling Frahm a liar, and that this denied him a fair trial. However, he fails to prove that the lack of an objection to this recording was deficient performance. It was a legitimate trial tactic to play the recording, and the recording itself was admissible. Furthermore, Frahm has failed to establish any prejudice in the playing of the recording because he has failed to demonstrate that the result of the trial would have been different had the recording not been played. His claim fails.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id. at 689.

But even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." *Id.* at 693. "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, *review denied*, 99 Wn.2d 1013 (1983). And the court

presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

"Criminal defendants are not guaranteed 'successful assistance of counsel.'" *State v. Dow*, 162 Wn.App. 324, 336, 253 P.3d 476 (2011) (quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). Not every error made by defense counsel that results in adverse consequences is prejudicial under *Strickland*, *supra*; *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a "strategy ultimately proved unsuccessful is immaterial." *Grier,* 171 Wn.2d at 43; *see also Dow*, 162 Wn.App. at 336. Last, with respect to the deficient performance prong of *Strickland*, "hindsight has no place in an ineffective assistance analysis." *Grier,* 171 Wn.2d at 43.

The decision on whether or not to object is "a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989), *review denied*, 113 Wn.2d 1002 (1989) (citing *Strickland*, *supra* and *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980)). There is a presumption that the failure to object was part of a legitimate trial strategy or tactic, and the burden is on the defendant to rebut this presumption.

State v. Johnston, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (citing *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (internal quotations omitted)). To rebut this presumption the defendant must show that "not objecting fell below prevailing professional norms;" that the objection would likely have been sustained; and that the result of the proceedings would have been different had the evidence not been admitted. *Id.*

In the present case, Frahm specifically argues that playing the recording of a pretrial interview of Frahm, without objection, allowed the State to admit improper hearsay and opinion testimony. He further argues that the lack of an objection provided him with ineffective assistance of counsel. However, recent cases show that the statements by officers in an interrogation questioning a defendant's veracity are not improper opinion testimony. Thus, the failure to object by Frahm's trial counsel was not deficient performance because the recording was admissible.

In *State v. Demery*, 144 Wn.2d 753, 764, 30 P.3d 1278 (2001), a plurality of the Supreme Court stated that playing a recorded interrogation where officers called the defendant a liar was not impermissible opinion testimony. The Court primarily relied on a Ninth Circuit case, *Dubria v. Smith*, 224 F.3d 995, 1001 n.2 (2000), where the Ninth Circuit held that juries won't give any special credibility to statements made by police officers during a pretrial interview. *Demery*, 144 Wn.2d at 763 (plurality

opinion). *Demery* and *Dubria* both stated that officer statements in a recorded interview that a defendant is lying give context to a defendant's answers and their admission does not violate federal due process rights. *Demery*, 144 Wn.2d at 764 (plurality opinion) (citing *Dubria*. 224 F.3d at 1001-02). The Court in *Demery* also stated that these statements are not testimony because they were not made under oath at trial. *Demery*, 144 Wn.2d at 765 (plurality opinion).

Applying *Demery* to the present case, the playing of Frahm's interrogation was not improper. This is because such recordings, even when the officers say that a defendant is lying, give context to a defendant's answers and do not carry a special aura of reliability. Here, when detectives told Frahm he was lying it was apparent it was for the purpose of eliciting a confession from Frahm. This is the exact same technique used by officers in *Demery* and *Dubria*, a technique that was not found to be improper opinion testimony. *Demery*, 144 Wn.2d at 764-65 (plurality opinion) (citing *Dubria*. 224 F.3d at 1001). This shows that the playing of the recording was not improper in this case, and by not objecting to its playing Frahm's trial counsel's performance was not deficient.

In *State v. Notaro*, 161 Wn. App. 654, 255 P.3d 654 (2011), this Court dealt with a very similar factual scenario to this case. In that case an

officer testified at trial about an interview with the defendant where officers initially taped the defendant, but then turned off the recorder. *Id.* at 658-59. The officer testified that he told the defendant that he did not believe the defendant's story during the interview. *Id.* at 664-65. This Court held that these types of statements by officers are accounts "of tactical interrogation statements designed to challenge the defendant's initial story and elicit responses that are capable of being refuted or corroborated by other evidence or accounts of the event discussed. *Id.* at 669. These types of statements were found to be interrogation tactics not opinion testimony, and they do not carry "a special aura of reliability usurping the province of the jury at trial." *Id.* at 669 (citing *Demery*, 144 Wn.2d at 763-65 (plurality opinion)).

Just as in *Notaro*, the statements by the detectives here were interrogation tactics, not opinions on Frahm's veracity. The detectives stated that they knew Frahm was lying to them, and asked him to tell them the truth. RP 778, 781. This is almost identical to what the officer said in *Notaro*. This shows that the statements by the detectives in this case that were played to the jury in the recorded interrogation were not improper. Frahm's counsel's failure to object to the recording's admissibility was not deficient performance because an objection would likely not have been sustained.

Furthermore, Frahm has failed to meet his burden that his trial counsel's performance was deficient. To prevail, Frahm must rebut the presumption that the failure to object to the recording was not a legitimate trial strategy. *Johnston*, 143 Wn. App. at 20 (citing *Davis*, 152 Wn.2d at 714). One of the requirements to rebut the presumption is to show that an objection would have likely been sustained. *Id.* However, as stated above, an objection to the playing of the recording likely would not have been sustained, so Frahm cannot meet his burden.

The decision to not object also does not fall below professional norms, because it was a legitimate trial tactic. *Id.* The logic behind not objecting to the recording was sound. The recording showed the detectives repeatedly questioning Frahm about his story, yet Frahm never confesses and repeatedly denies his involvement. RP 778, 781, 784, 790, 792. This allowed his trial counsel to argue his denials to the jury because Frahm did not testify at trial. RP 1450. By not having Frahm testify, it protected him from cross-examination by the State while still putting forth his version of events. Furthermore, Frahm's attorney used Frahm's denials in the recording to further his theory of the case: that Frahm was not guilty of the Vehicular Homicide charge. RP 1570-71. His counsel argued that it was Mr. Delacruz-Moreno who was a superseding cause of Mr. Irvine's death, and that Frahm was not guilty of killing Mr. Irvine. RP 1561-69. His

counsel used the interrogation during closing arguments to argue that it was a bad decision for Frahm to lie to the detectives, but that it was only because he was scared of what he did that night. RP 1571. He then argued that the jury should not use that fear against him for the Vehicular Homicide charge, and ultimately only asked the jury to acquit Frahm of that charge. RP 1571, 1574. This shows that playing the recoding was a legitimate trial tactic.

Frahm's failure to meet his burden establishing his counsel's performance was deficient is further supported by the reasoning of this Court in the unpublished *State v. English*, 198 Wn.3d 1019, Slip Op. 46921-9-II (March 21, 2017), which this Court may consider as nonbinding persuasive authority under GR 14.1(a).[1] In that case, two co-defendants similarly argued that they received ineffective assistance of counsel when their trial attorneys agreed to play part of a recorded police interview containing an officer questioning the defendant's veracity. *Id.* at 10-11. This Court rejected their claim of ineffective assistance of counsel and held that there was a strong presumption of effective assistance, and that the playing of the recording supported the theory of the case: that the defendant was not guilty of the charges. *Id.* at 11. The State asks this

[1] GR 14.1(a) states in part, "...unpublished opinions of the Court of Appeals filed on or after March 1, 2014, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Court to follow the reasoning of *English* and hold that the playing of the recording in this case was also a legitimate trial tactic that allowed Frahm to argue his theory of the case to the jury. Frahm has failed to meet his burden and establish that his counsel's performance was deficient.

Finally, even if Frahm's counsel's performance was deficient, he has also failed to meet his burden to prove that he suffered any prejudice. He must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Crawford*, 159 Wn.2d at 99-100 (quoting *Strickland*, 466 U.S. at 694)). When reviewing the evidence presented by the State in this case, Frahm cannot demonstrate there was a reasonable probability that the result of the trial would have been different absent the recording.

The State presented evidence from twenty-nine witness that was all acquired and presented independently from the recorded confession. RP 167-1,253. The State presented substantial evidence that tied Frahm's truck to the collision: DNA evidence that tied Frahm to his truck at the time of the collision, 911 calls that identified and described his erratic driving, the 911 call from Mr. Irvine that identified Frahm's truck as the cause of the first accident and also the exact time when Mr. Irvine was

struck in the second collision, video evidence that showed Frahm leaving in his truck just before the collision, testimony from Ms. Morton that established Frahm's level of intoxication and the reason and time he left her apartment, cell phone tracking data that corroborated Ms. Morton's testimony and showed Frahm's movements before the collision, and event recorder data from Frahm's truck detailing the collision and his flight from the scene. RP 169-71, 173-74, 248-49, 271, 285-86, 352, 354-56, 402-4, 424, 426-27, 453, 457, 642-44, 653-55, 667, 676, 669-70, 859-877, 1048-49, 921-56, 1053-1057, 1061, 1072-1076 1137, 1147 1151-54, 1216-19.

In the face of this overwhelming evidence, Frahm cannot demonstrate that withholding the recording of the detectives questioning his veracity would have changed the outcome of the trial. A reasonable probability is one that is sufficient to undermine the confidence in the outcome, but Frahm has not met this standard. *Crawford*, 159 Wn.2d at 99-100 (quoting *Strickland*, 466 U.S. at 694). In *English*, this Court found that the defendant failed to demonstrate the outcome at trial would have been different in the face of evidence similar to what was presented in the present case. *English,* 198 Wn.3d 1019, Slip Op. 46921-9-II at 11.[2] There, the State presented evidence of text messages and emails exchanged

[2] This is an unpublished opinion which is not binding on this Court. GR 14.1(a) states in part, "...unpublished opinions of the Court of Appeals filed on or after March 1, 2014, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

between the defendants on the day of a robbery, testimony that the defendants met up before the robbery, and witness testimony that they had both been involved in the robbery. *Id.* Therefore, this Court found, that even if counsel's performance was deficient, the defendant did not prove prejudice as he failed to demonstrate the outcome of the trial would have been different had counsel not agreed to the admission of the police interview. *Id.* The State asks this Court to follow the ruling of *English*, because, as stated above, the State presented overwhelming evidence of Frahm's guilt on all of the charges, and the outcome of the trial would not have been different had Frahm's attorney objected to the admission of the recording.

Frahm has failed to meet his dual burden to prove that his counsel's performance was deficient, and that this deficiency affected the outcome of the trial. There is a strong presumption of effective counsel, and Frahm has failed to overcome it. The recording was admissible, his counsel did not err in failing to object to it, and even without the recording the evidence of his guilt was overwhelming. His claim fails.

IV. The State does not intend to seek a cost bill

The State does not intend to seek a cost bill in this case in the event it substantially prevails on appeal. Frahm's argument is therefore moot.

CONCLUSION

The State respectfully asks this Court to affirm Frahm's convictions.

DATED this 21 day of June, 2017.

Respectfully submitted:

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