

No. 96217-1

No. 49995-9-II

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

STATE OF WASHINGTON

Respondent

vs.

DEAN IMOKAWA

Appellant

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ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY  
The Honorable Scott Collier  
Superior Court No. 15-1-01561-3

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APPELLANT'S OPENING BRIEF

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MARK W. MUENSTER, WSBA #11228  
1010 Esther Street  
Vancouver, WA 98660  
(360) 694-5085

STEVEN W. THAYER, WSBA #7449  
112 W. 11<sup>TH</sup> Street  
Vancouver, WA 98660  
(360) 694-8290

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## I. ASSIGNMENTS OF ERROR

1. Appellant assigns error to Court's Instruction no. 10.<sup>1</sup>
2. Appellant assigns error to Court's Instruction no. 11.
3. Appellant assigns error to Court's Instruction no. 15.
4. Appellant assigns error to Court's Instruction no. 16.
4. Appellant assigns error to the court's failure to give Defense Proposed instruction No. 7.
5. Appellant assigns error to the court's failure to give Defense Proposed instruction No. 8.
6. Appellant assigns error to the court's failure to give Defense Proposed instruction No. 10.
7. Appellant assigns error to the denial of his motion to dismiss made at the close of all the evidence and to his conviction upon insufficient evidence.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When deciding the issue of superseding cause was crucial to a fair determination of guilt or innocence on both Counts I and II, did the court deny appellant due process of law by failing to unambiguously place the burden on the state to disprove superseding cause? (Assignments of Error 1-5)
2. Did the court commit reversible error in failing to include as an element in the "to convict" instructions for vehicular homicide and vehicular assault, that the state had to disprove superseding or intervening cause? (Assignments of Error 1-5.)
3. Should the court have granted the defense motion to dismiss when the totality of the evidence showed that Mr. Imokawa had at most been ordinarily negligent in merging back into the left lane after overtaking Mr. Grier on the right? (Assignment of Error 7)

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<sup>1</sup> The instructions referred to in the Assignments of Error are included in the Appendix for the convenience of the court.

4. Was there sufficient evidence of acts of aggravated negligence to support the jury's verdicts? (Assignment of Error 7)

### III. STATEMENT OF THE CASE

#### A. Procedural History

Dean Imokawa, appellant herein, was charged by an information filed August 18, 2015 with vehicular homicide in violation of RCW 46.61.520, vehicular assault in violation of RCW 46.61.522 and reckless driving in violation of RCW 46.61.500. CP 1.

The court heard preliminary motions on January 5 and January 9, 2017. Trial began on January 5, 2017. At the close of the state's case, defense counsel moved to dismiss the charges. The motion was denied. RP IV 651-52. At the close of the defense case, defense counsel renewed the motion to dismiss. The motion was again denied. RP IV 744-45. On January 19 the jury returned guilty verdicts on Counts I and II. CP 74, 76. Mr. Imokawa was acquitted on Count III, reckless driving. CP 78. The jury found by special verdicts that Mr. Imokawa had acted in disregard for safety on counts I and II, but did not find he had acted recklessly. CP 75, 77. RP V 847.<sup>2</sup>

After rejecting the prosecutor's recommendation of thirty months in prison, the trial court sentenced Mr. Imokawa to 26 months in prison, at the low end of the standard range. CP 97. RP V 863, 873, 885. The court set bond at \$50,000. Mr. Imokawa filed a timely notice of appeal. CP 111.

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<sup>2</sup> The VRP, which is in five volumes, is numbered consecutively. References are to the volumes prepared by the transcriber, which do not necessarily cover a single day's proceedings.

B. Trial Testimony

Bobby Clark, a retired state trooper, responded to an automobile collision on State Route 503 in Clark County, Washington on April 2, 2015 about 9:30 AM. RP I 181-82. There were three vehicles which had been involved, a grey SUV<sup>3</sup>, a Land Rover, and a tan pickup truck. The driver of the SUV was Linda Dallum. RP I 186. Her passenger was Eleanor Tapani. RP I 186. The driver of the pickup truck was appellant Dean Imokawa. RP I 186. The driver of the Land Rover was Nicholas Grier. RP I 187.

The SUV had extensive front-end damage, while the pickup also had extensive damage. Ex. 26, 64. It appeared to Clark that the SUV had hit the pickup on its right (passenger) side. RP I 184. There was damage to the right front corner of the Land Rover and the left rear quarter panel of the pickup. RP I 195-96. The third vehicle, the Land Rover, was north of the other two on the right shoulder of the southbound lanes. RP I 186.

Clark went to the hospital and talked with the husband of Linda Dallum. Ms. Dallum, the driver of the Kia SUV, had substantial injuries which were consistent with being in an automobile collision. RP II 447,

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<sup>3</sup> Later testimony established more clearly the types of cars involved. The SUV was a Kia Sorrento, RP IV 465, and the tan pickup was a GMC pick up truck. RP 656.

455. Her passenger, Ms. Tapani, died from injuries she received during the collision.<sup>4</sup>

Trooper Jeffrey Heath came to the scene after other troopers were there. RP II 200. He spoke briefly with Mr. Imokawa, who told him he was not sure what happened. While travelling northbound, Mr. Imokawa had been passing a Land Rover, lost control of his vehicle and collided with the guardrail on the shoulder of the southbound portion of the road. Then he was struck by another vehicle. RP II 202. Heath did not ask Mr. Imokawa about whether he had been struck by the Land Rover or how he thought the collision had been caused. RP II 205.

Heath followed Mr. Imokawa to the hospital where he was being treated. He and Trooper Jennings went through a DRE examination with Mr. Imokawa. Both troopers concluded he had no noticeable signs of drug or alcohol impairment. RP II 205, 207.

Trooper Matthew Hughes came to the accident scene to document it photographically. RP II 219. The court admitted his photographs as exhibits 15-66 without objection from the defense. RP II 219. The physical evidence from the cars and from the scene showed the GMC pickup had two collisions, one with the guardrail and one with the Kia. The left rear quarter panel of the GMC also had damage which indicated contact with the Land Rover. RP II 223, 225; Ex. 22. Lodged inside the

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<sup>4</sup> Dennis Wickham, the medical examiner, testified Eleanor Tapani's injuries were consistent with being caused by a motor vehicle collision, due to her multiple injuries in different parts of the body. The cause of death was multiple blunt force injuries. RP III 441-442.

rear wheel well of the GMC were portions of the Land Rover's headlight assembly, which became ensnared there when those two vehicles were in contact. RP II 226; Ex. 23, 24. The angle of impact between the GMC and the Land Rover would be hard to determine, but it was a sideswipe type contact. RP II 227. There were no tire marks in the lane in which the Land Rover had been to suggest that it had been braking hard, in contrast to the clear indications that the Kia had been braking hard to avoid a collision with the GMC pickup. RP II 254-55; 277. The physical evidence did not indicate whether the Land Rover had sped up before its collision with the GMC.

Debbie Mera was going north on SR503 when she saw a plume of smoke ahead of her. She was part way down a hill that led to the bridge over Salmon Creek on SR 503 when she saw this. RP II 281; Ex. 8, 9, and 12. She did not know what caused the collision between the GMC pickup and the Land Rover, and had not taken notice of their speed, or either car's behavior before their collision. The pickup was in the fast (left) lane when she saw the smoke plume. RP II 290.

John Gain was also northbound on SR 503. He had been in the left lane at the light at 119th Street, which was south of the collision site. A truck that was behind him in the left lane moved to the right hand lane and then passed him and moved back to the left lane, which he did not consider unusual because he had not been going the speed limit himself. RP II 294-295; 312. When he got to the intersection of SR 503 and 149<sup>th</sup>

Street, he was in the right lane. There was a Land Rover in the left lane, ahead of the GMC truck which had passed him earlier at 119<sup>th</sup> Street. RP II 299-300.

As traffic went down the hill from the intersection, there was another car in the right lane which was ahead of the Land Rover. RP II 302. He did not see any vehicle in front of the Land Rover in the left lane. RP II 317. The pickup truck had been “hugging” the back of the Rover as they went down the hill. The pickup pulled into the right lane and Gain was not sure where the GMC was going to go because of the other car ahead in the right lane. The pickup’s turn signal came on to move into the left lane. RP II 304-305; 315. As the GMC pickup was passing the Land Rover, the back of the GMC truck “nicked” the front of the Rover, and the GMC went into a slide into the southbound lanes. RP II 305. Another vehicle going southbound then collided with the pickup truck after it hit the guardrail on the southbound side of the road. RP II 305.

Gain had been about 300-400 feet behind the Land Rover and the GMC pickup and had a clear view. Gain could not say there had *not* been enough space for the GMC to merge back into the left lane in front of the Land Rover. RP II 316. He also could not tell if the Land Rover had increased its speed as it was being overtaken by the GMC. He believed that the speed limit on that stretch of SR 503 was either 50 or 55 MPH. RP II 306-307.

Steve Wicklander was also northbound on SR 503. After the traffic light at 149<sup>th</sup>, he set his cruise control for 60. He was in the left lane. As he was crossing the bridge over Salmon Creek, he looked in his rear view mirror. RP II 327, 329. There was a vehicle to his right making about the same speed he was. RP II 330. There was a black car in the left lane behind him which he later found out was the Land Rover. He saw a “Chevy” truck coming down the hill in the fast lane. RP II 329. He saw it move into the right lane and come up even with the black car (the Rover). RP II 331. When he next checked his mirror, the GMC truck was sliding sideways and went into the southbound lanes. RP II 332. He did not see the Land Rover speed up before this happened. RP II 333. He simply did not know whether or not the Land Rover sped up as the GMC was passing. RP II 339. When asked on cross-examination if there was enough room for the GMC to make the lane change, he acknowledged he had told the investigating trooper that “there was room [for the GMC] to make a lane change but he did not make it properly.” RP II 340.

Richelle Streitt was driving home from her work as a bus driver. She was going southbound on SR 503. She saw the GMC truck come into the southbound lanes from the northbound lanes. A southbound vehicle ahead of her collided with the truck. RP II 346. She saw the truck and another vehicle come together when the truck was still going northbound. There was a lot of white smoke when they collided. RP II 350, 35. There were no cars in front of them at that point. RP II 352.

Nicholas Grier was going northbound on SR 503 toward his home in Battle Ground. RP II 356. He had been driving continuously in the passing (left) lane since the Fred Meyer store in Orchards. RP II 363. A pickup truck came up behind him and flashed its lights at him. It came close to his rear bumper. RP II 357. He “lit up” his brakes and made a hand gesture at the other driver. There were cars in both the right and left hand lanes ahead of him. RP II 359. After he “tapped” his brakes, the other driver backed off. RP II 360.

When he first noticed this other car, he was traveling in the passing lane about 40-45 MPH, which was below the speed limit. RP II 380-381. The other driver had come up close behind at the railroad tracks and Grier hit his brakes to back the other driver off. He wanted the other driver to get “off his butt.” He knew the other driver still wanted to pass, and could have moved over to the right lane to allow this. RP II 384-86.<sup>5</sup> Around the railroad tracks he was still going only 45-50 MPH in the passing lane. RP II 387.

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<sup>5</sup> This was his duty under RCW 46.61.100, which provides in pertinent part as follows: **Keep right except when passing, etc.**

(1) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

(a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

...

(2) Upon all roadways having two or more lanes for traffic moving in the same direction, all vehicles shall be driven in the right-hand lane then available for traffic, except (a) when overtaking and passing another vehicle proceeding in the same direction, (b) when traveling at a speed greater than the traffic flow, (c) when moving left to allow traffic to merge, or (d) when preparing for a left turn at an intersection, exit, or into a private road or driveway when such left turn is legally permitted....

(4) It is a traffic infraction to drive continuously in the left lane of a multilane roadway when it impedes the flow of other traffic.

It was clear to Grier that the driver of the truck had wanted to pass him when the other driver flashed his headlights. He did not feel the need to move over because there were cars ahead of him in both lanes. RP II 382. In his view, it was pointless of the other driver to even want to pass. Grier never even thought to move over to let the other driver pass. RP III 390.

After the intersection of SR 503 and 149<sup>th</sup> Street, the other driver came up close again, then backed off and moved into the right hand lane. As they went down the hill toward the Salmon Creek bridge, the truck was overtaking him in the right hand lane. The other driver then turned on his left turn signal and came into the left lane, striking his vehicle. This was at the bottom of the hill. RP II 362. He noticed the turn signal because it was mounted on the side view mirror of the pickup. RP II 362.

The truck's left rear tires were about even with his front tire when the truck moved into the left lane. RP II 365. There was another vehicle in front of him in the left lane and also one in the right lane. Grier did not think there was sufficient time for the pickup truck to merge back to the left lane. He held onto his steering wheel and slammed on his brakes. The pickup truck went sideways and off into the southbound lanes. RP II 366; RP II 393. A southbound car hit the truck broadside and both went over into the guardrail. RP II 366.

Grier claimed he was not trying to prevent the other car from passing him. He claimed he had no real reason to leave the left lane

because of other traffic ahead of him in both lanes.<sup>6</sup> RP II 362. He testified that he did not speed up as the truck turned on its left turn signal to prevent the pickup truck from merging back into the left lane ahead of him. RP II 368. He denied trying to “close the door” on the pickup truck, but he did not slow down to let him pass either. RP II 395- 396.

Linda Dallum was driving southbound on SR 503 from Battle Ground to Vancouver with her mother. She saw something happening ahead of her on the other side of the Salmon Creek bridge and then a large truck was sliding horizontally toward her. RP III 468-71. She turned her wheel to avoid the collision but there was not enough time. RP III 473-4. Her airbag deployed after the collision. RP III 475. She was in the hospital for four days afterward and was in a wheel chair for three months afterward due to her injuries. RP II 479. She did not see what caused the truck to be sliding towards her. RP III 482.

David Ortner, a trooper with the Washington State Patrol did the “total station” data collection which allowed a scale diagram of the accident scene to be presented. This was admitted as Ex. 69 and 70. RP III 489-90. He also downloaded the data from the airbag module of Mr. Imokawa’s GMC truck. RP III 494. There was no similar data available from the Land Rover and hence no objective evidence about its speed at

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<sup>6</sup> This claim was contradicted by the testimony of Ms. Streitt, RP II 352, Mr. Wicklander , RP II 329 (only the black Land Rover was behind him) and Mr. Gain, RP II 317, three of the drivers called by the State as witnesses.

the time of its impact with the GMC. From the road data, there was no indication the Land Rover had applied its brakes. RP III 500-501.

Detective Maier is a State Patrol accident reconstructionist. RP III 521. He interviewed Mr. Imokawa at the hospital and Mr. Imokawa told him that as he attempted to change lanes, Mr. Grier had accelerated and cut him off. RP III 524.

Maier could determine the point of impact between the Kia and the GMC by looking at the bowed area of the guardrail on the southbound side of the road, and from where the Kia's tire marks stopped. RP III 560. But he could not determine the precise point of impact between the Land Rover and the GMC on the northbound portion of the road. RP III 559. The first tire marks which were indicative of contact were just over the lane divider between the right hand and left lanes on the northbound side. RP III 562. It was his "feeling" that the Land Rover had not sped up to create the impact with the GMC. It was the GMC which impacted the Land Rover. RP III 562. If the Land Rover had hit the GMC, he would have expected to see a different damage profile, causing different front-end damage on the Land Rover than what he saw. Ex. 41, 42, 44. RP III 564-565.

The GMC's airbag module showed its speed 5 seconds before the deployment of the airbag. RP III 566. The deployment event was when the GMC hit the guardrail. There was also a "non-deployment" event when the Kia struck the GMC. RP IV 611. The speed of the GMC was 68

MPH about 5 seconds before its collision with the guardrail. RP III 615, 617. The data also showed that the brakes had been depressed within 5 seconds of the impact with the guardrail. RP IIV 616. There was no similar data available from the Land Rover. RP III 566. This was in part because the State Patrol did not have the proprietary software to download this information.<sup>7</sup> Consequently, there was no roadway evidence or data recorder evidence to determine whether or not the land Rover had sped up before its impact with the GMC. RP III 568.

There was no roadway evidence that the Land Rover had applied its brakes or locked up its brakes before impact. RP III 569, 573. Most of the physical evidence showed the contact had taken place in the left lane. RP III 573. However, a reconstructionist bases his opinion on the cause of a collision on more than just roadway evidence, including the damage done to the vehicles. RP III 582.

After the state rested, RP IV 631, Dean Imokawa testified on his own behalf. He was 46 years old at the time of the trial. He was employed by the Bonneville Power Authority as a power system dispatcher. He was an experienced driver, and had owned the GMC pickup involved in the collision for 10 years. He had been commuting on SR 503 for at least two years and knew the road well. RP IV 655-657, 666.

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<sup>7</sup> Trooper Ortiz, who gave the majority of the testimony about the data recorders, also gave her opinion that the Land Rover's impact with the GMC would not have been enough to trigger an airbag response on the Land Rover's data recorder. RP IV 629.

On the day of the collision, he saw another vehicle, a Dodge, pass the Land Rover by moving into the right lane. When Mr. Imokawa came up behind the Land Rover in the left lane, he turned on his headlights to signal his intention to pass. RP IV 658, 676. At this point, the Land Rover was doing less than the posted speed limit, but remained in the left lane. RP IV 658. He was close enough so that the Land Rover would know he wanted to pass. RP IV 675. Mr. Imokawa wanted the Land Rover to move to the right lane. As the Rover was doing less than the speed limit, Mr. Imokawa did not think the Rover was trying to pass any other traffic. RP IV 677. He felt it could be courteous for the Land Rover to move to the right to let him pass. RP IV 681.

After the intersection at 149<sup>th</sup> and SR 503, Mr. Imokawa moved up closer to the Land Rover and then the driver “brake checked” him, i.e. applied his brakes hard and suddenly without needing to stop. RP IV 659, 678. Mr. Imokawa thought this was dangerous driving. RP IV 679. He wanted to get around the Land Rover after it “brake checked” him. RP IV 680-81, 694. Mr. Imokawa backed off, and then moved into the right lane to overtake the Land Rover on the right. RP IV 660. There was another vehicle ahead of him in the right lane further up the road. There was also a Dodge ahead of the Land Rover in the left lane. RP IV 682. He sped up and then put on his turn signal blinker to signal his intention to change back to the left lane. He checked his side view mirror for space and then tried to merge back into the left lane. He was positive he had enough space

to do that safely. RP IV 661-662, 694. He was going about 70 MPH at this point when he passed the Land Rover but did not intend to continue at that speed. RP IV 662.

Based on his past driving experience, he felt he had enough space to merge back into the left lane. He expected the Land Rover to allow him to reenter the left lane because he himself would slow down and allow another car that had signaled its intention to pass in this situation. But as he tried to merge back, the driver of the Land Rover sped up and hit him. RP IV 661, 663, 685, 686, 693. He hit the guardrail on the opposite side of the oncoming lanes and then had a second hard side impact. His airbag deployed. He remembered getting out of his car and sitting somewhere and tried to collect himself. RP IV 663.

Mr. Imokawa did not recall talking with Trooper Heath at the scene. RP IV 664, 687. He told Detective Maier at the hospital that the driver of the Land Rover had sped up and cut him off. RP IV 664, 690. He only found out about the injuries to the occupants of the Kia when he was at the hospital. RP IV 665, 688-89.

Neither weather nor adverse road conditions contributed to the collision. The visibility was good and traffic volume was light. RP IV 669-71. While Mr. Imokawa did not think it was the other driver's duty to get out of his way, he felt it was everyone's responsibility to make safe lane changes and everyone's duty to drive safely and accommodate other drivers. RP IV 691-92.

#### IV. ARGUMENT AND AUTHORITY

A. Due process of law requires that a jury be clearly informed that the state bears the burden of disproving superseding/intervening cause in prosecutions for vehicular homicide and assault.

Due process of law under the Fourteenth Amendment to the United States Constitution and Art. I §3 of the Washington Constitution requires that the state prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A corollary to this fundamental rule is that the State cannot require the defendant to disprove any fact that constitutes the crime charged. *State v. W.R.*, 181 Wn. 2d 757, 336 P.3d 1134 (2014). “When a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the defendant. The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist.” *State v. W.R.*, *supra* at 336 P. 3d 1138.

The vehicular homicide statute, RCW 46.61.520, requires the state to prove that a defendant driver proximately causes the death of another person and the driver is either driving while intoxicated, driving in a reckless manner, or driving with disregard for the safety of others.<sup>8</sup> The

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<sup>8</sup> RCW 46.61.520

**Vehicular homicide—Penalty.**

(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.

vehicular assault statute is essentially similar, except as to the damage threshold to the victim.<sup>9</sup> Neither statute defines the concept of proximate cause, nor provides a definition of “reckless manner” or “disregard for safety of others.” The fleshing out of these terms has been left to case law. See, e.g. *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2004).

A defendant is not liable for vehicular homicide or vehicular assault if there is a superseding cause of the injuries. *State v. Meekins*, 125 Wn. App. 390, 105 P.3d 420 (2005). A superseding cause “is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.” In other words, even if a defendant’s actions were a proximate cause of death or injury, he may defend against the charge by showing that the act of another, including in some cases the deceased, was an “intervening force...which actively operates in producing harm to another *after* the actor's negligent act or omission has been committed.” *Meekins* at 105 P.3d 145 (emphasis added).

In the present case, Mr. Imokawa presented evidence that the intervening act of Mr. Grier in accelerating so as to prevent him from safely returning to the left lane after passing caused their initial collision,

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<sup>9</sup> RCW 46.61.522

**Vehicular assault—Penalty.**

- (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
- (a) In a reckless manner and causes substantial bodily harm to another; or
  - (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or
  - (c) With disregard for the safety of others and causes substantial bodily harm to another.

which in turn directly led to the fatal collision with the Kia automobile driven by Linda Dallum. He proposed jury instructions which would clearly place the burden of proof on the state to show that Mr. Grier's actions were not a superseding or intervening cause of the death and injury. CP 21-38; RP IV 718-720. The court erred in failing to give these instructions and in so doing, denied Mr. Imokawa due process of law.

B. A supervening cause negates the element of proximate cause in a prosecution for vehicular homicide or vehicular assault.

Washington cases that have considered the issue have concluded that a supervening or intervening cause negates proximate cause:

Proof of a superseding, intervening event allows an intoxicated defendant to avoid responsibility for the death.[citation omitted] It breaks the causal connection between the defendant's act of driving in violation of the statute and the victim's injury, and the intervening act becomes the superseding cause of injury. *State v. Morgan*, 123 Wn. App. 810, 99 P.3d 411 (2004), citing *State v. Souther*, 100 Wn. App. 701, 998 P.2d 350 (2000).

As the *W.R.* court observed, a defense negates an element of the crime where the two cannot co-exist. In the *W.R.* case, the court held that forcible compulsion, an element of second-degree rape, could not co-exist where there was consent, which was a defense to the charge. While a defendant had to produce some evidence of consent, it was a violation of due process to force him to prove the defense by a preponderance of the evidence. *State v. W.R.*, 336 P.3d at 1139. The same analysis applies to the defense of superseding cause in a prosecution for vehicular assault or homicide as to the element of proximate cause. Proximate cause by

definition cannot co-exist where there is a superseding cause. As the *Morgan* and *Souther* courts observed, the causal chain is broken when there is an intervening cause. An intervening cause thus negates the element of proximate cause.

- C. A court must clearly instruct the jury that the state has the burden of disproving superseding cause.

In *State v. Acosta*, 101 Wn. 2d 612, 683 P.2d 1069 (1984), the court held that the absence of self-defense was an element on which the state had the burden of proof in an assault prosecution. The court followed the due process analysis it had begun in *State v. McCullum*, 98 Wn. 2d 484, 656 P.2d 1064 (1983), in which it had held that the absence of self-defense was an element that state had to prove in a homicide prosecution. In both cases, the court looked first to the statutes to see if there was a legislative intent to place the burden of proof on the defense. Both courts found there was no such indication. The *Acosta* court noted that even if the Legislature *had* intended to require the defendant to prove self-defense, such an allocation would only be constitutional if the defense did not *negate* an element of the crime. The *Acosta* court held that self-defense negated the knowledge requirement for assault. 101 Wn. 2d at 616. Consequently, the state was saddled with the burden of disproving self-defense in an assault case where the issue was raised.

The court then turned to the related question of how the jury should be instructed on the allocation of the burden of proof. The court said:

The jury should be informed in some unambiguous way that the state must prove the absence of self-defense beyond a reasonable doubt. The defendant is entitled to a correct statement of the law, and should not be forced “to argue to the jury that the State [bears] the burden of proving absence of self-defense.” [*State v.*] *Savage* at 582<sup>10</sup>. Rather, the defense attorney is only required to argue to the jury that the facts fit the law; the attorney should not have to convince the jury what the law is. *Acosta, supra* at 621-22.

Like the issue of self-defense, the legislature has not allocated to the defense the burden of proof on the issue of superseding cause. Even if it had, however, such an allocation would be unconstitutional because the existence of a superseding cause negates proximate cause, which is an element of the offenses of both vehicular homicide and vehicular assault. Consequently, under *Acosta*, the jury must be clearly informed in “an unambiguous way” that the state must disprove the existence of a superseding cause once the issue is raised.

D. The instructions in this case did not unambiguously inform the jury that the state had the burden to disprove superseding cause.

The trial court gave instructions which discussed the concept of intervening/superseding cause and how it related to proximate cause. Instructions 10 and 15, CP 57, 62. But it rejected the additional language

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<sup>10</sup> *State v. Savage*, 94 Wn. 2d 569, 618 P.2d 82 (1980)

which the defense proposed, which would have clearly told the jury which party had the burden of proof on this issue:

The state has the burden of proving beyond a reasonable doubt both (1) that the conduct of the defendant was a proximate cause and (2) that the conduct of Nicholas Grier did not constitute a superseding cause of the collision which resulted in the injuries and death that occurred in this case.

Proposed Instruction 7, CP 28-29.

The court also rejected the defense versions of the elements instructions, which both added as an element that “the conduct of Nicholas Grier was not a superseding cause of the injuries” suffered by the victims. CP 30-31 33-34; RP IV 725. Consequently, defense counsel was left without any basis in the instructions to argue that the state not only had to prove Mr. Imokawa’s conduct was a proximate cause, but that it also had to disprove that Grier’s conduct was not a superseding or intervening cause. This was clearly reversible error under *Acosta* and *W.R.*

In *State v. Morgan*, 123 Wn. App. 810, 99 P.3d 411 (2004), the court at least cursorily considered the issue presented in this case. Morgan was charged with vehicular homicide under the intoxication prong, and argued that the conditions of blinding sunlight on his way back from a ski trip was the intervening/superseding cause of his collision. Morgan’s car had crossed the centerline, and had a head-on collision, killing an oncoming driver in her own lane. No other vehicles were involved.

Morgan apparently argued that the state had the burden of disproving the superseding/intervening event. It is not clear from the opinion whether this issue was raised by instructions he proposed. The primary challenges he raised to the jury instructions appear to be that (1) the charging document stated that his actions were “the” proximate cause of death, whereas the “to convict” instruction merely said that his conduct was “a” proximate cause of the death and (2) that the “to convict” instruction required a causal connection between his driving and the death, rather than between his intoxication and the death. The allocation of proof argument was characterized by the *Morgan* court as a “corollary argument” to his other attacks on the instructions given by the court. 99 P.3d at 416. The court’s decision does not mention the due process clauses of either constitution, nor any of the due process/burden allocation cases such as *McCullum* and *Acosta*. The court dismissed the argument as follows:

This argument is unnecessary, as the burden to disprove the superseding event is automatically assumed by the State's other burdens of proof. 99 P.3d at 416.

The court then quoted from *State v. Roggenkamp*, a juvenile court case in which no jury instructions were involved and which involved a challenge to the sufficiency of the evidence in a bench trial:

[T]he State assumed the burden of proving beyond a reasonable doubt all the elements of vehicular homicide.... Thus, by proving that [the defendant's] actions were the proximate cause of the injuries and the death, the State necessarily proved that [the defendant's] actions were not broken by any new independent

cause.... Assuming the burden of proving the absence of a superseding cause is on the State, the State met that burden by proving that [the defendant's] actions were a proximate cause of the injuries and death.

*Morgan*, *supra* at 416, quoting from *State v. Roggenkamp*, 115 Wn. App. 927 64 P.3d 92 (2003).

Neither *Roggenkamp* nor *Morgan* is controlling on the issue presented in this appeal. Neither really decided whether failing to clearly and unambiguously delineate the burden of proof on the issue of superseding cause is reversible error in a case where the instructional issue was squarely raised. To the extent that they discuss the issue at all, they can be read to support the argument that a superseding cause defense negates proximate cause and hence the burden of proof to disprove a superseding cause must fall on the state.

E. The court's instruction on proximate cause did not clearly allocate the burden of proof on superseding cause to the state.

Other courts have recognized the logical difficulties involved in the pattern instructions on proximate cause and superseding cause. In *State v. Souther*, 100 Wn. App. 701, 998 P.2d 350 (2000), the defense proposed an alternative instruction to the pattern instruction given by the court which made it clear that it was a defense to a charge of vehicular homicide if the death was caused by a superseding, intervening event. *Souther* pointed out that in the pattern instruction, the language concerning the effect of a superseding cause is buried in between language that says that the acts of another are *not* a defense and language suggesting what is *not* a superseding cause. 998 P. 2d at 354-55. The *Souther* court agreed that the

language was confusing and that the language of the instruction was self-contradictory. 998 P.2d at 355. However, the court found that any error which resulted was harmless beyond a reasonable doubt under the facts of that case. Souther's proposed intervening cause was either that the adverse driver was speeding or had misled him regarding his intentions to turn. The court found that at most these were at most concurring causes, not superseding causes, and therefore were not a defense to the charge.

In *State v. Meekins*, 125 Wn. App. 390, 105 P.3d 420 (2005), the defendant was charged with vehicular homicide as a result of a collision between his vehicle and an oncoming motorcycle. The defense contended that the motorcycle's failure to have its headlight on caused the defendant not to see it coming and to turn left in front of it. The court gave an instruction on contributory negligence, but also an instruction which flatly stated that contributory negligence was not a defense to the charge of vehicular homicide. The court did not instruct the jury that contributory negligence might be material on the issue of whether the defendant's negligence was a proximate cause of the motorcyclist's death. The court held that by precluding the jury from considering whether the failure to have a light was either a superseding cause or the sole cause of the death, the instructions on contributory negligence were improper and required reversal of the conviction.

While *Meekins* did not raise the due process issue presented by this case, it is an illustration of the difficulties juries may have with the issue

of proximate cause and other causes than may contribute to the injuries in a collision and demonstrates why an instruction which places the burden on the state to disprove a superseding cause is absolutely necessary. As in *Meekins*, in the present case the jury was never told in an unambiguous manner that the state had to disprove that Grier's conduct was a superseding cause of the collision between Mr. Imokawa's GMC and Ms. Dallum's Kia SUV. The instructions that were given in this case on proximate cause and its relationship to a superseding cause have the same flaws that concerned both the *Meekins* and *Souther* courts.

Since superseding cause negates proximate cause, due process of law required that the state assume the burden of disproving superseding cause in this case. The "elements" instructions failed to correctly allocate the burden of proof, and the definitional instruction on proximate cause and superseding cause muddied the waters further. The erroneous jury instructions deprived Mr. Imokawa of a fair trial.

F. The instructional errors were not harmless.

The Supreme Court has applied a harmless-error test to erroneous jury instructions. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). However, the Court held "an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." *Brown*, 147 Wn.2d at 339. In other instances, an instructional error which affects a constitutional right requires reversal unless the State

can prove the error was harmless beyond a reasonable doubt. *State v. Mills*, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005) (citing *Neder*, 527 U.S. at 1; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)). The State cannot meet that burden in this case.

- G. The evidence was not sufficient to convict Mr. Imokawa of vehicular homicide or vehicular assault because the state did not prove beyond a reasonable doubt that his attempt to merge back into the left lane after overtaking another car constituted anything other than ordinary negligence.

Mr. Imokawa moved to dismiss all the charges both at the end of the state's case and at the conclusion of all the evidence. The trial court erred in denying the second motion to dismiss.

In order to sustain a conviction, the state must prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The standard of review when a challenge to the sufficiency of the evidence is made on appeal is whether a rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt, giving the benefit of the inferences from the evidence to the non-moving party, the state. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Hoffman*, 116 Wn. 2d 51, 82, 804 P.2d 577 (1991); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

The jury rejected the prosecutor's argument that Mr. Imokawa had driven in a reckless manner on Counts I and II, and also rejected the substantive charge of reckless driving in Count III. This court must thus

determine whether the evidence supported the alternative chosen by the jury, disregard for safety of others.

The jury was instructed that disregard for the safety of others meant “an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than ordinary negligence” and that “ordinary negligence in operating a motor vehicle does not render a person guilty of vehicular homicide or assault.”

Mr. Imokawa’s driving did not meet the required threshold of “aggravated negligence.” While the state’s evidence showed that he was driving over the speed limit, at the time he was attempting to overtake Mr. Grier’s Land Rover, which was blocking the passing lane.<sup>11</sup>

Steve Wicklander, one of the several drivers who saw the lead up to the collision, told the State Patrol trooper that he thought that there was room enough for the GMC to make the lane change if it were done properly. RP II 340. John Gain, who was behind both the GMC and Land Rover, could not say there was *not* enough space for the GMC to merge back into the left lane in front of the Land Rover. RP II 316. He also could not tell if the Land Rover had increased its speed as it was being overtaken by the GMC. Gain had not thought there was anything unusual about Mr. Imokawa’s passing him on the right at the previous intersection since he was going below the speed limit. He saw the GMC turn on its blinker to signal its intention to re-enter the left lane. He testified that as the GMC

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<sup>11</sup> Grier admitted he was not trying to pass slower traffic. See RCW 46.61.100 at FN 5, *supra*.

moved back into the left lane, the back of the truck just “nicked” the Land Rover, sending it into the oncoming lane. Gain saw no vehicle directly in front of the Land Rover either, as Grier had claimed.

The physical evidence showed the damage to Mr. Imokawa’s GMC truck was to the very left rear quarter panel. Ex. 22, 23. The damage to the Land Rover was to its very right front bumper. EX 41, 42, 43. Moreover, the roadway evidence showed that the GMC was almost entirely in the left hand lane and had almost completed its pass before any impact occurred. RP III 562, 572. Thus, even assuming Mr. Imokawa miscalculated the space available, the miscalculation was slight.

Mr. Imokawa was an experienced driver. The jury was entitled to credit his testimony that he checked his side view mirror before attempting to merge back into the left lane, and concluded there was adequate space to make the attempt.

There was nothing illegal or negligent about Mr. Imokawa using the right lane to overtake and pass another vehicle.<sup>12</sup> While a driver making a lane change has the duty to do so only if the lane change can be made with safety and to signal his intention to do so, RCW 46.61.305, Mr.

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<sup>12</sup> RCW 46.61.115 provides in part as follows:

1) The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:

...

(b) Upon a roadway with unobstructed pavement of sufficient width for two or more lines of vehicles moving lawfully in the direction being traveled by the overtaking vehicle.

Imokawa had signaled his intention and clearly thought there was sufficient room to make his lane change with safety.

Once again, in Mr. Wicklander's view, there was room for the lane change. This demonstrates at most ordinary negligence in miscalculating the space available to make the lane change.

Slight miscalculations of judgment are common and therefore constitute ordinary negligence. On the other hand, gross miscalculations of judgment are uncommon, and thus constitute aggravated negligence. Because the margin of error in this case was so slight, it constitutes at most ordinary negligence. Consequently, there was insufficient evidence to support the jury's verdict, even under the deferential standard of review that applies here.

## V. CONCLUSION

A superseding cause breaks the chain of proximate cause and thus negates that element of the state's case. When a defense negates an element of the state's case, due process requires that the state must disprove the defense beyond a reasonable doubt. The jury must be clearly informed in the instructions of this burden, so that defense counsel does not have to convince them about both the law and the facts.

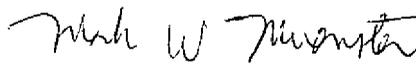
Mr. Imokawa provided evidence that the driving of Mr. Grier was a superseding cause, even if the state had proven Mr. Imokawa drove with disregard for the safety of other vehicles by trying to re-enter the left lane without an adequate margin of safety. Grier's driving broke the chain of

causation, but the jury was never informed that the state had to disprove this fact. The court's failure to give the correct and appropriate jury instructions proposed by the defense denied Mr. Imokawa due process of law under the Washington and United States Constitutions, and is reversible error that requires a new trial. This court should reverse the convictions and remand for new trials on Counts I and II.

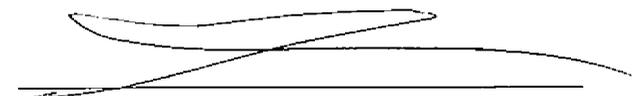
The jury properly rejected the prosecutor's argument that Mr. Imokawa was driving in a reckless manner. The evidence was likewise insufficient to support the jury's verdict that he had driven in a manner demonstrating aggravated negligence, rather than ordinary negligence. This court should reverse the convictions on Counts I and II and dismiss the information.

Dated this 8<sup>th</sup> day of June, 2017

LAW OFFICE OF MARK W. MUENSTER



Mark W. Muenster, WSBA 11228



Steven W. Thayer WSBA 7449

Of Attorneys for Appellant

INSTRUCTION NO. 10

If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death, it is not a defense that the conduct or driving of the deceased or another may also have been a proximate cause of the death.

However, if a proximate cause of the death was a new independent intervening act of the deceased or another 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.

However, if in the exercise of ordinary care, the defendant should reasonably have 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. 11

To convict the defendant of the crime of vehicular homicide, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about April 2, 2015, the defendant drove or operated a motor vehicle;
- (2) That the defendant's driving or operation of the motor vehicle proximately caused injury to another person;
- (3) That at the time of causing the injury, the defendant was driving operating the motor vehicle
  - (a) in a reckless manner; or
  - (b) with disregard for the safety of others;
- (4) That the injured person died as a proximate result of the injuries; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (4), and (5), and any 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 of 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 the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

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

However, if a proximate cause of substantial bodily harm was a new independent intervening act of the injured person or another 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.

However, if in the exercise of ordinary care, the defendant should reasonably have 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.

A-2 (A)

INSTRUCTION NO. 16

To convict the defendant of the crime of vehicular assault, each of the following four elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about April 2, 2015, the defendant operated or drove a vehicle;
- (2) That the defendant's vehicle operation or driving proximately caused substantial bodily harm to another person;
- (3) That at the time the defendant
  - (a) operated or drove the vehicle in a reckless manner; or
  - (b) operated or drove the vehicle with a disregard for the safety of others; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), and (4), and any 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 of 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 the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty.

No. \_\_\_\_\_

If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of substantial bodily injury to another, or death of another, it is not a defense that the driving of another may also have been a proximate cause of the substantial bodily harm to, or death of, another.

However, if a proximate cause of substantial bodily harm or death was a new independent intervening act of another 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 or death. An intervening cause is an action that actively operates to produce harm to another after the defendant's act has begun.

However, if in the exercise of ordinary care, the defendant should reasonably have 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 or death fall within the general field of danger which the defendant should have reasonably anticipated.

The State has the burden of proving beyond a reasonable doubt both (1) that conduct by the defendant was a proximate cause and, (2) that the conduct of Nicholas Grier did not constitute a superseding cause of the collision which resulted in the injuries and the death that occurred in this case.

WPIC 90.08

*State v Meekins*, 125 Wn.App 390 (2005)

*State v McAllister*, 60 Wn.App. 654 (1991)

*State v. W.R.*, 181 Wn.2d 757 (2014)

*State v. Acosta*, 101 Wn.2d 612 (1984)

No. \_\_\_\_\_

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

- (1) That on or about April 2, 2015, the defendant drove or operated a motor vehicle;
- (2) That the defendant's driving proximately caused injury to Eleanor Tapani;
- (3) That at the time the injuries to Eleanor Tapani were inflicted, the defendant was operating the motor vehicle either
  - (a) in a reckless manner, or
  - (b) with disregard for the safety of others;
- (4) That the conduct of Nicholas Grier was not a superseding cause of the injuries sustained by Eleanor Tapani;
- (5) That Eleanor Tapani died of a proximate result of the injuries; and
- (6) That the acts occurred in Clark County, State of Washington.

If you find from the evidence that Elements (1), (2), (4), (5), (6) and either Elements (3)(a) or (3)(b) have been proved by a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, you need not be unanimous as to which of the alternatives (3)(a) or (3)(b) have been proved beyond a reasonable doubt so long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

A-6

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of Elements (1), (2), (3), (4), (5), or (6) then it will be your duty to return a verdict of not guilty.

A-7

No. \_\_\_\_\_

To convict the defendant 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 April 2, 2015, the defendant operated or drove a vehicle;
- (2) That the defendant's driving proximately caused serious bodily injury to Linda Dallum;
- (3) That at the time the injuries were inflicted, the defendant was operating a motor vehicle
  - (a) in a reckless manner, or
  - (b) with disregard for the safety of others;
- (4) That the conduct of Nicholas Grier did not constitute a superseding cause of the injuries sustained by Linda Dallum; and
- (5) That the defendant's acts occurred in Clark County, State of Washington.

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

A-8

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

**June 08, 2017 - 3:56 PM**

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