IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON	No. 39857-5-II
Respondent,	
v.	
DONALD LEROY ROBBINS	UNPUBLISHED OPINION
Appellant.	

Worswick, J. — A jury convicted Donald Leroy Robbins of vehicular assault. On appeal, he argues that the State failed to present sufficient evidence that his driving was the proximate cause of his passenger's injuries. In his Statement of Additional Grounds, he presents what he considers to be new evidence. We affirm.[1]

At about 8:30 a.m. on November 16, 2008, Robert Marx saw a truck driven by Robbins cross the centerline of a road, swerve back into its own lane, drive into a ditch, go airborne, barrel roll and strike the guide wire for a power pole. The truck's passenger, Eric Castleberry, was ejected from the truck and suffered a fractured left hand, a broken right arm, a sprained right ankle and facial lacerations. Clark County Sheriff's Deputy Alexander Schoening and emergency medical personnel responded to the scene. While tending to Robbins, paramedic Jeffrey Freeman smelled alcohol on Robbins' breath and noticed that he was slurring his speech. Robbins told

[1] A commissioner of this court initially considered Robbins's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

Freeman that he had been drinking that morning.

Deputy Schoening interviewed Robbins at the hospital and also smelled alcohol on Robbins's breath. Robbins said the crash occurred because he was using his left hand to shift gears, as a result of his right arm being in a sling. Robbins admitted to drinking alcohol to treat the pain in his arm. Deputy Schoening arrested Robbins and obtained a blood draw. That blood draw, taken four hours after the crash, contained 0.11 grams of alcohol per 100 milliliters of blood. It also contained Valium, an anti-anxiety medication, and Celexa, an anti-depressant.

The State charged Robbins with vehicular assault. Marx, Castleberry, Freeman, Deputy Schoening and the laboratory scientist testified as described above. Robbins testified that he had been released from the hospital late on November 15, 2008, after injuring his right arm at work. He had not been able to fill his prescription for pain medications that night, so he consumed Valium for sleep. He arose about 7:00 am and drank some malt liquor to treat his pain and anxiety. He and Castleberry got in his truck to drive to Wal-Mart to fill his prescription. The truck's transmission would not shift into third or fourth gear and its brakes were not working properly, requiring him to slow the truck by downshifting. But because his right arm was in a sling, he had to shift using his left arm. They encountered fog. While unsuccessfully trying to downshift with his left arm, he crossed the centerline. He tried to steer back into his lane, but instead drove into a ditch and went airborne. He said he had no steering, because the battery had fallen out of the truck while airborne, and that the truck ran into a telephone pole.

The jury convicted Robbins as charged. It found unanimously that Robbins was "operating the motor vehicle while under the influence of intoxicating liquor" and was "operating

the motor vehicle with disregard for the safety of others." CP 64.

In order to convict a defendant of vehicular assault, the State must prove beyond a reasonable doubt that the defendant's operation of the vehicle was the proximate cause of the victim's injuries. *State v. Roggenkamp*, 115 Wn. App. 927, 943-47, 64 P.3d 92 (2003), *aff'd*, 153 Wn.2d 614, 630-31, 106 P.3d 196 (2005); *State v. McAllister*, 60 Wn. App. 654, 660-61, 806 P.2d 772 (1991). But if there was an intervening act "which the defendant should not have anticipated as reasonably likely to happen, then there is a break in the causal connection between the defendant's negligence and the plaintiff's injury, and the intervening act is the superseding cause of the plaintiff's injury." *Roggenkamp*, 115 Wn. App. at 945-46 (citing *McAllister*, 60 Wn. App. at 660).

Robbins argues that one or more of the following may have been intervening causes of Castleberry's injuries: (1) the injury to his right arm, which required him to shift with his left arm; (2) the wetness of the road and the faulty truck brakes, which required him to slow by downshifting; (3) the faulty truck transmission that prevented him from downshifting; and (4) the loss of steering when the battery fell out of the truck while airborne. But Robbins was aware of causes (1) through (3) when he started driving the truck, so they cannot be intervening causes. And taken in the light most favorable to the State, the evidence showed that any loss of steering occurred as a result of Robbins's operation of the truck and was at most a concurring cause of Castleberry's injuries. *Roggenkamp*, 115 Wn. App. at 947. Concurring causes do not shield a defendant from a conviction for vehicular assault. *Roggenkamp*, 115 Wn. App. at 947. The State presented sufficient evidence that Robbins's operation of the truck proximately caused

Castleberry's injuries.

In his Statement of Additional Grounds, Robbins presents two points of what he considers new evidence: (1) that his use of alcohol is necessary to treat his anxiety and that his use of alcohol restores him to normal functioning rather than resulting in intoxication; and (2) the evidence shows that he minimized the injuries to Castleberry and himself by maintaining some control of the truck as it left the road, thus demonstrating that he was not intoxicated at that time. "Newly discovered evidence" must be evidence that "the defendant could not have discovered with reasonable diligence and produced at the trial," CrR 7.5(a)(3), or that "by due diligence could not have been discovered in time to move for a new trial," CrR 7.8(b)(2). Robbins's new evidence meets neither standard. He could have produced evidence regarding his claim that his alcohol use did not render him intoxicated. And he did testify as to his efforts to control the truck. The jury disagreed with his contention that he operated the truck with reasonable regard for the safety of others.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Hunt, J.

Penoyar, C.J.