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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 29768-3-III
Respondent,	)	
v.	)	
JONAS JACKSON KEYS, IV,	)	
Appellant.	)	UNPUBLISHED OPINION

Siddoway, J. — Jonas Keys IV was convicted of vehicular homicide and reckless endangerment arising out of his role as lead driver in a late-night, high-speed road game that resulted in another driver's loss of control and the death of two teenaged passengers. He appeals, claiming there was insufficient evidence that he drove with disregard for the safety of others or that his actions proximately caused the two deaths. The statements and testimony of Keys and other surviving participants, together with reasonable inferences therefrom, provide sufficient support for the challenged findings and conclusions. Keys also challenges the term of his community custody, which the State concedes is excessive. We reverse that part of his sentence for correction on remand and

otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

Two young women, then age 18, were driving around Klickitat around midnight one February night in 2010 when they met up with 22-year-old Jonas Keys IV, known to his friends as "J.J.," and his 17-year-old passenger, Tim Archer.[1] For about an hour the two drivers and their passengers drove in and out of town playing what the driver of the women's car referred to as "car games"—"like hide and seek and tag all mixed together, but with cars." I Report of Proceedings (RP) (Feb. 9, 2011) at 108. One driver would get in front and try to elude the car that was following; the driver of the car in the rear would flash his or her lights or signal when the lead car was found, and then the rear car would take the lead and the game would start over. No passing by one vehicle of the other was involved.

Eventually, with Keys the "leader," the two cars headed out of town, north on State Route 142 toward Goldendale. They were noticed by 19-year-old Ron Prominski, who had himself been driving in town with three male friends: 19-year-old Levi Sanchey was his front seat passenger and two 16-year-old friends were seated in back. Prominski and Sanchey could see that Keys' car and the women's car were chasing or following

[1] For convenience, we use a pseudonym for the child witness. The pseudonym matches the actual initials.

each other and began following them out of town. Prominski knew Keys and the two women; they had all grown up in Klickitat. Keys soon noticed a second pair of headlights behind him and was pretty sure it was Prominski's car.

After the now three-car caravan drove through a residential area outside of town known as "Suburbia," Prominski came up fast behind the women's car, revving his motor and moving toward the left side of the lane behind them; according to the driver of the women's car, it was as if he was challenging her to a race or preparing to pass her. When they reached a straight stretch, Prominski passed the women going 50 to 55 miles per hour in the 40 mile per hour zone. After he passed, the two lead cars accelerated and pulled away from the women, who did not try to keep up. As the driver of the women's car later explained, her car had poor acceleration and would rattle if she went over 60 miles per hour.

Both Archer and Sanchey would provide statements to officers estimating their peak speeds on straight stretches of the road that night at between 70 and 75 miles per hour. Conditions at this time were pitch dark and the sky was overcast. It had rained during the evening, and the pavement was damp with mist on it.

Prominski caught up to Keys, who was then traveling at about 60 miles per hour. Prominski tried to pass but Keys, who wanted to prevent Prominski from passing, put his gas pedal to the floor and "stomp[ed] on it" to keep him from doing so. III RP (Feb. 14,

2011) at 427. He successfully prevented Prominski from passing. As the two cars arrived at a series of turns and curves in the state road, both cars slowed down and Prominski pulled back in behind Keys.

The stretch of State Road 142 from Klickitat south of the Ice House campground that Keys and Prominski were then approaching is bordered by a guardrail on the Klickitat River side and a high bank rising up from the roadway with a narrow drainage ditch on the opposite side. The approach to the campground involves a series of curves going slightly downhill with a final somewhat straight stretch, and is a no passing zone.

As they drove through the curves in the no passing zone, Prominski stayed several car lengths behind and did not try again to pass Keys until after they began the final approach to the Ice House campground. At the last curve before the straightaway, posted at 30 miles per hour, Keys was going 40 and Prominski was about a car length behind. Sanchey estimated Prominski might have been driving as fast as 60 to 65 miles per hour as he drove through the last curve behind Keys.

As Prominski came out of the last curve, he began his second effort to pass Keys. For a couple of seconds, Keys and Archer saw the headlights from Prominski's car to the left, behind them, and recognized that he was making a move to pass. After noting that Prominski was approaching him on the left, Keys looked away from the mirror to focus on the road. By the time he looked back, he had lost sight of him. Archer, too, noticed

that Prominski had moved into the oncoming lane at the top of the hill, while still in the last curve, and had moved to within about a foot of the back of Keys' car when it appeared that his lights suddenly went out.

Keys and Archer thought that Prominski was playing games with them by turning off his lights, as he had done before, and they continued driving. Not long thereafter, they pulled over when they could see that the headlights that were by now behind them were those of the women's car, not Prominski's. When the women reached Keys' stopped car, the four realized that Prominski had likely had an accident. They drove back toward the campground area, where they saw Prominski's car on fire in a ditch. The teenaged passengers in the back seat of his car died as a result of injuries sustained in the wreck.

Prominski and Keys were both charged. Keys was charged with two counts of vehicular homicide for the deaths of Prominski's 16-year-old passengers, and with two counts of reckless endangerment for causing substantial risk to Sanchey and Archer.

Keys was tried in a three-day bench trial. All of the surviving participants from the three cars other than Prominski, who invoked the Fifth Amendment, testified. The State also called state patrol trooper Mark Boardman as an expert in accident reconstruction. Trooper Boardman testified that, in his opinion, Prominski had pulled into the oncoming lane to pass, caught a tire in dirt alongside the edge of the road,

overcorrected, and veered across the lanes behind Keys. Prominski's car slid along the end of the guardrail, struck a boulder and a tree, and finally came to rest down an embankment near the entrance to the campground. The back end of his car collapsed into the rear passenger area.

Keys admitted that he was speeding that night, but maintained that he was driving in a safe manner. He had driven the road many times, in both directions. He testified that he knew his car could handle the road conditions and that he never exceeded his "comfort zone." III RP (Feb. 14, 2011) at 417.

The trial court found Keys guilty on all counts and entered findings of fact and conclusions of law supporting its determination. It imposed the standard range sentence of 26 months for each vehicular homicide count and 6 months for each reckless endangerment count, to run concurrently. The court also ordered a term of 18 months' community custody. This appeal followed.

ANALYSIS

An individual is guilty of vehicular homicide in Washington

> [w]hen 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 . . . if the driver was operating a motor vehicle:
>
> (a) While under the influence of intoxicating liquor or any drug . . .; or
>
> (b) In a reckless manner; or
>
> (c) With disregard for the safety of others.

RCW 46.61.520(1). The court found Keys guilty of vehicular homicide on the third basis: that he had operated his motor vehicle with disregard for the safety of others.

> A person is guilty of reckless endangerment
>
> when he or she recklessly engages in conduct . . . that creates a substantial risk of death or serious physical injury to another person.

RCW 9A.36.050. A person is reckless or acts recklessly "when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c).

Keys assigns error to (1) a number of the trial court's findings of fact, (2) the court's conclusion of law determining that he was guilty of vehicular homicide, (3) the court's failure to enter written findings that the elements of reckless endangerment were proved beyond a reasonable doubt, and (4) the 18-month term of community custody imposed as part of the sentence. We address his assignments of error in turn.

I

Keys assigns error to nine of the court's findings of fact. Challenges to the sufficiency of the evidence to sustain conviction in a bench trial require this court to determine whether substantial evidence supports the trial court's findings and whether the findings support the challenged conclusions of law. *State v. Rose*, 160 Wn. App. 29, 32,

246 P.3d 1277 (2011), *aff'd in part, rev'd in part*, ___ Wn.2d ___, 282 P.3d 1087 (2012). A defendant challenging the sufficiency of evidence in a criminal case admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). The party challenging a finding of fact bears the burden of demonstrating that it is not supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). This court "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *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)).

Finding of Fact 1.10. Keys first challenges finding 1.10, that "[o]nce Prominski joined the group, they all immediately left Klickitat heading towards Goldendale on State Route 142[.] Keys was in the lead, followed by [Christina Staples, driver of the women's car]. Prominski was third in line." Clerk's Papers (CP) at 60. Keys objects to the inference that Prominski had "joined the group," and was heading toward Goldendale *with* the others, calling this "pure speculation." Br. of Appellant at 16.

A recurring theme of Keys' challenges to this and other findings is that the trial court engaged in speculation about why Prominski and Keys were driving where and how they were on the night of the accident. He argues:

> Prominski was not part of the follow the leader game around town . . . and there was no evidence he'd ever participated in any late night driving get-togethers around town. Passing cars had never been part of the get-together activities. And there was no evidence Prominski asked to join Mr. Keys and Staples in their travels, or that either one encouraged him to participate. *Prominski simply began following on his own. He chose to pass Staples' car, and pulled back in front of her as a reasonable driver would on a two-lane road.*
>
> *. . . It is unsupported conjecture to view his attempt to pass Mr. Keys as some sort of a challenge, rather than a driver's simple decision to pass another car in light of favorable circumstances. . . . One failed attempt to pass is not evidence that Mr. Keys was participating in any game with Prominski.*

Br. of Appellant at 16-17 (emphasis added).

It is important to point out in response to this recurring argument that all of the survivors in the three cars provided statements to officers either the night of the accident or within a couple of months thereafter. Keys' statements were admitted in evidence, and statements of the other participants (other than Prominski's) were used when they were questioned at trial. The statements and testimony included the participants' lay opinions as to what was going on in the interaction between the three drivers—opinions that came into evidence without objection. The inferences reflected in the court's findings are therefore in many (if not most) cases the inferences of the surviving participants, not the

trial court.

While ER 701 implicitly expresses a preference that lay witnesses relate facts from which the trier of fact can form its own opinions and conclusions, it does permit witnesses to testify to

> those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

Among circumstances where lay opinions are admissible are where they are a sort commonly drawn from collected facts: where "[t]he witness's opinion is based on perceived facts; the opinion is a type of inference that lay persons commonly and reliably draw; and—the key to the [collected facts] doctrine—the lay witness cannot verbalize all the underlying sensory data supporting the opinion." Edward J. Imwinkelried, Evidentiary Foundations § 9.02[2] at 372 (8th ed. 2012).

Keys might or might not have succeeded had he objected to the admission of the participants' lay opinions at trial—opinions such as whether the drivers were engaged in a game, whether Prominski had joined it, whether Prominski was attempting to pass other drivers, or like matters. If he had objected and his objection had been sustained, the State would have had the opportunity to question the witnesses about the collected facts that supported their inferences. But in many cases Keys did not object. The trial court was

entitled to rely on the unchallenged opinions of the participants on those matters in making its findings.

With respect to finding 1.10, Sanchey, the surviving passenger in Prominski's vehicle, testified:

> Q Where did—where did you and Mr. Prominski go *when you were following Mr. Keys and Ms. Staples?*
> A Out of town.
> Q Did you follow them around town, or just straight out of town?
> A Straight out of town.
> Q But you don't remember where it was that you saw them the first time?
> A I don't.
> Q Okay. *Who was in the lead* as you were going out of town?
> A J.J.
> Q When you went out of town what direction were you going?
> A Towards Goldendale.

II-A RP (Feb. 10, 2011) at 239 (emphasis added). Archer, Keys' passenger, testified:

> Q Okay. What did you do then? What—what did the cars do then?
> A After we saw Ron?
> Q Yes.
> A Well, *he just got in the back of the line and we continued to drive around town*.
> Q Okay. For how long did—that—when you say in the back of the line, that means Mr. Keys, the girls, and then Ron?
> A Yes.

Id. at 201-02 (emphasis added). The passenger in the women's car testified that while in town, they saw Prominski's car traveling in the opposite direction, waved at him, and "then out of nowhere Ron shows up and we're like, 'Oh, okay. Hi, Ron,' slowed down,

you know, *let him—made sure he had enough room to get in*." I RP (Feb. 9, 2011) at 113-14 (emphasis added). She testified without objection that when she saw Prominski drive past, she thought "[t]hat *he was going to join our game, just drive around with us*." *Id.* at 115 (emphasis added). The record contains evidence of no other explanation of where Prominski and Sanchey were headed on their drive out of town if not to follow Keys and the women, or why, when Keys and the women realized that Prominski's car was no longer in the queue, both turned around to go back and look for him. Sufficient evidence supports the court's finding that Prominski had joined as the third car in the group.

Finding of Fact 1.18. Keys assigns error to the finding that "Staples never saw their taillights again until the Ice House straightaway." CP at 61 (misnumbered as 1.19). Ms. Staples' testimony was inconsistent on this score. When first asked whether she saw the taillights of the two lead cars again after Prominski passed her and the two lead cars went around a corner, she testified:

> A Not until the point I got pretty much right there by the ice house, and the only pair of tail lights I seen was at the end of the straight stretch, which I assumed was Ron.

I RP (Feb. 9, 2011) at 90. Upon further questioning, however, including being reminded of the statement she had provided to officers near the time of the accident, she agreed that it was possible she had seen the two cars again and that their taillights were close together, as if Prominski was now trying to pass Keys. Given her clarification and the

trial court's finding 1.2 that the participants' statements at or near the time of the accident were most credible, the last sentence of finding 1.18 was not supported by substantial evidence.

Findings of Fact 1.19, 1.20, and 1.21. Keys challenges the trial court's related findings 1.19, 1.20, and 1.21, which state:

> [1.19[2]] With Prominski's entry into the game, the game changed. Prominski challenged Keys to a speed game or contest. Keys readily accepted the challenge.
> 1.20 Prominski then tried to pass Keys, still on the straight stretch just past Suburbia, in a passing zone. Keys put his gas pedal to the floor to keep Prominski from passing him and "stomped on it." He knew Prominski would not be able to pass him if he got to the curves.
> 1.21 Prominski's front bumper got to Keys' passenger door, but Keys sped up, thwarting the pass.

CP at 61.

Keys again argues that the trial court drew unwarranted inferences about Prominski's conduct. Yet here again, the trial court could rely on a number of facts established by the evidence and on inferences that were testified to by the surviving participants without objection. The driver of the women's car testified:

> Q . . . When you came out of Suburbia, were you aware that Mr. Prominski was trying to pass you?
> A *Yeah. He was moving to the left side of his lane. So I was thinking that he was gonna try to pass*.
> Q When we were talking the other day you said—you used the word challenged, that you felt that he was challenging you. What did you

[2] The finding was misnumbered 1.17.

mean by that?
A *He was coming closer and closer to my tail end, and moving further and further to the left side of the lane. So I figured that he was either going to try to challenge me into a race or pass me.*
Q Okay. What made you think he might challenge you into a race?
A *Revving of engine. Stuff like that.*

I RP (Feb. 9, 2011) at 88 (emphasis added). Her passenger testified:

Q When you were speaking with [Detective David] Ortner you described Mr. Prominski's driving at the time that he passed you as he was just driving to get with the game?
A *Yeah.*
Q What did you mean by that? Just clarify.
A *Just to join us.*
. . . .
Q You thought that the game had changed. What made you think that that game changed?
A *Because Ron was trying to pass J.J., and then would slow down and get back and then try to pass him.*
Q And he couldn't pass him?
A *No. It didn't look like he was—he was trying but he wasn't trying at the same time.*
Like he'd get right next to J.J., and then slow down and then get back up next to J.J.
Q So that was after they'd passed you at Suburbia that was going on?
A *Yeah.*
Q Okay.
A *After he had already passed us then he started—trying to pass J.J., or trying to edge J.J. on; I'm not sure.*
Q But—But the two of them kept going and they were—they were going at some speed at that time.
A *Yeah.*

Id. at 120-21 (emphasis added).

Keys' own testimony provides support for the findings. He admitted that when

Prominski attempted to pass him the first time, Prominski's front bumper got to his passenger door. He admitted that he "'wanted to stay in front of [Prominski]'" and managed to do so by "stomping on it," pushing the gas pedal to the floor. III RP (Feb. 14, 2011) at 427. When interviewed by officers a couple of months following the accident, he told the investigating officers that he knew that if he could get Prominski into the curves, Prominski would not be able to pass him.

Keys argues that characterizing his actions as "thwarting" Prominski's attempted pass is an unwarranted interpretation. But the court's inference was reasonable in light of Keys' testimony that he stomped on the pedal, intended to stay in front of Prominski, and knew that Prominski would not be able to pass him if he got to the curves.

Finding of Fact 1.25. Keys next challenges finding 1.25, that

> [a]s Keys exited [the] last curve before the Ice House entrance, at about mile post 15, he accelerated to at least 60 miles per hour. As Keys entered the first straightaway, Prominski had already started to make his move, having started to pass well back in the curve.

CP at 61. Keys argues that this finding as to when Prominski began his second attempt to pass is supported only by Archer's testimony and that Sanchey's testimony was different; Sanchey testified that Prominski's vehicle was in the right lane while going around the final corner and they waited for a safe spot before attempting to pass.

The trial court was entitled to rely on the evidence provided by Archer, and

explicitly did so, finding that

> [Archer] is credible on this point. He was in a better position and a better witness on this fact than anyone else. [Archer] was watching, keenly aware of what Prominski was doing. [Archer], Keys' friend, gives the most credible evidence on the last few seconds before Prominski lost control.

CP at 62 (Finding of Fact 1.26). We defer to the trier of fact on credibility issues. Archer's testimony was substantial evidence.

Finding of Fact 1.27. Keys challenges finding 1.27, that

> [e]veryone was clearly engaged. They were not driving along at the speed limit talking about girls or sports or cars. They were speeding, music blaring, not talking, going fast.

CP at 62.[3]

Evidence in support of finding 1.27 included Keys' statement to officers that he and Archer were listening to music "pretty loud" and that he and Prominski had been speeding. II-B RP (Feb. 10, 2011) at 352. He also told officers that during the period when Prominski was approaching and attempting to pass him, Archer "wasn't saying anything," or at least he did not recall Archer saying anything, other than, when Prominski attempted to pass the first time, "he looked over and mentioned Ron was getting close to me, and he was going to—attempt to pass me." *Id.* at 364-65. Sanchey

[3] Keys' argument about this finding does not limit itself to its evidentiary support; he also contends from this finding that the trial court relied solely on his speed to conclude that Keys was driving with disregard for the safety of others. We address the sufficiency of the findings to support the court's conclusion in section II, below.

testified that Prominski drove at 70 to 75 miles per hour on the straightway in Suburbia and caught up to Keys. Keys stated he was going 60 miles per hour in a 40 mile per hour zone. Sanchey further testified that he estimated Prominski's speed to be 60 or 65 coming out of the last curve before the campground entrance, in a 30 mile per hour zone.

It is not completely clear what the trial court meant by its inference that "[e]veryone was clearly engaged," but we interpret the court to have inferred that Keys' and Prominski's driving conduct in the critical period leading up to the accident was first and foremost with a view to the game in which they were engaged. We view the evidence in the light most favorable to the State. *Kintz*, 169 Wn.2d at 551. Giving the State the benefit of every inference, the court's inference was not unreasonable.

Finding of Fact 1.30. Keys challenges the trial court's finding that "[n]either Keys nor [Archer] were surprised by Prominski's abrupt passing attempt." CP at 62. While Keys argues that this was unsupported conjecture, it was directly addressed in his statement and testimony.

When interviewed by detectives following the accident, Keys stated that he was not surprised that Prominski tried to pass him. He explained that some people try to pass coming out of the curve above the Ice House campground despite the double center line, because it is possible to see headlights down the road. Keys also told officers that if a car had been coming at them in the opposite lane and it appeared Prominski might not have

enough time to pass, Keys would have braked. He acknowledged again at trial that he was not surprised by Prominski's second attempt to pass him.

As to Archer, we find no testimony in the record that he testified to either surprise or lack of surprise at Prominski's second effort to pass. The trial court's finding as to Archer appears to have been based on inference. It stated in its oral ruling:

> Neither Mr. Keys nor Mr. [Archer] were surprised about the abrupt passing attempt. This is the best evidence, credible evidence. And how could they be? They had just thwarted Mr. Prominski's pass earlier. Mr. Prominski had been behind them, if not tailgating then fairly close, through the curves.
>
> Nothing has changed under these facts. What would surprise is if Mr. Prominski did not attempt another pass.

III RP (Feb. 22, 2011) at 494-95. Given Archer's other testimony, the court's inference that Archer was not surprised by the second attempt to pass was not unreasonable.

Finding of Fact 1.31. Keys challenges finding 1.31, that

> [i]n the second or two before Prominski's car lost control, Keys' car passed over the dip in the road. While Prominski's passing attempt did not surprise Keys, the dip did. Keys has traveled this road presumably hundreds of times. He has lived in Goldendale or Klickitat all his life. He testified he had never noticed the dip before. A reasonable inference is that he has never before traveled over the dip that fast.

CP at 62. Keys argues that this inference ignores testimony from the State's accident reconstruction expert that the roadway had no bumps or irregularities, and that the reduction in grade is fairly smooth.

Keys, Archer, and Sanchey all testified that there *is* a dip in State Route 142 in the vicinity of the end of the curve before the road drops downhill to the campground. They all testified that it was in the area of this dip that Prominski lost control of his car. Keys claimed complete familiarity with the state highway where the accident occurred yet, when asked if the dip had surprised him, told officers, "'Kind of, going at that speed, and I never really notice[d] it.'" III RP (Feb. 14, 2011) at 435. Given the three participants' familiarity with the roadway and their consensus that there is a dip near where Prominski lost control, the trial court was entitled to credit their testimony despite the testimony of the officer, who might simply have been speaking in different terms when he testified that "the elevation does drop . . . . There is a—a reduction in grade. But it is fairly smooth." I RP (Feb. 9, 2011) at 74-75. The court was also entitled to take judicial notice of the greater impact on a vehicle of a bump or dip in a roadway that is encountered at high speed.

Of the nine findings challenged by Keys, only one—the finding that Staples did not see the men's taillights again after she was passed and they rounded a corner—is not supported by substantial evidence in light of her clarification. Her clarified testimony that she might have seen them again, apparently driving close, with Prominski possibly attempting to pass Keys, is no more helpful to Keys.

II

Keys next assigns error to the trial court's second conclusion of law, which states:

> Viewing all of the facts relevant to the incident—the time of night, the wet roads, the speed of the defendant's driving, the thwarted passing event a few minutes prior, the continued game-playing by the defendant—Mr. Keys was Driving with Disregard for the Safety of Others. And there is a direct, unbroken, causal connection between the Defendant's Driving with Disregard for the Safety of Others with the deaths that occurred that night.

CP at 63.

Keys contends that his actions did not exceed ordinary negligence and, therefore, do not constitute disregard for the safety of others. In addition, he asserts that the State failed to prove that his actions were a proximate cause of the accident because Prominski's wrongful conduct was the superseding cause of death.

Driving "with disregard for the safety of others" within the meaning of RCW 46.61.520(1)(c) means driving with "an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term 'negligence.'" *State v. Eike*, 72 Wn.2d 760, 765-66, 435 P.2d 680 (1967). It requires evidence of some conscious disregard of the danger to others. *State v. Vreen*, 99 Wn. App. 662, 672, 994 P.2d 905 (2000), *aff'd*, 143 Wn.2d 923, 26 P.3d 236 (2001). Generally this requires that the State prove more than that a defendant was speeding. Disregard for the safety of others has been held to be satisfied by crossing a center line while driving in bad weather

and speeding, *State v. Brooks*, 73 Wn.2d 653, 659, 440 P.2d 199 (1968); crossing the center line on a rainy night at 45 to 50 miles per hour, *Eike*, 72 Wn.2d at 766; driving on the wrong side of the road, *State v. McNeal*, 98 Wn. App. 585, 593, 991 P.2d 649 (1999), *aff'd*, 145 Wn.2d 352, 37 P.3d 280 (2002); and engaging in a racing and passing game with a friend at excessive speed, *State v. Escobar*, 30 Wn. App. 131, 137, 633 P.2d 100 (1981).

Even if we accept as true Keys' insistence that he was driving within his "comfort zone," a driver engaged in a passing game late at night, on a damp road, at the highest speed he believes he can maintain safely and under control, is driving with disregard for the safety of others. He is, after all, inviting the possibility if not the likelihood that the other contestant in the game will have to drive at a *higher* speed, one that the other driver may well not be able to maintain safely and under control, in order to pass. And while these participants fortunately did not encounter oncoming traffic upon emerging from the final curve above the Ice House campground, Keys was acting with disregard for the safety of anyone who had been approaching from the north.

Keys does not seriously contend otherwise. Rather, he argues it was "pure speculation" for the court to conclude that Prominski had engaged the women and him in a passing game. He asks us to accept, again, that "Prominski simply . . . chose to pass Staples' car, and pulled back in front of her as a reasonable driver would," and that

Prominski's "[o]ne failed attempt to pass [Keys] is not evidence that Mr. Keys was participating in any game with Prominski." Br. of Appellant at 17. In short, he asks us to ignore the surviving participants' belief that they *were* engaged in a road game. He asks that we view the evidence in the light most favorable to *him*, giving *him* the benefit of every inference. But our review is deferential, recognizing that the trial court was in the best position to determine the facts.

The trial court's material findings bearing on Keys' culpability were all supported by the evidence. Its findings support its conclusion that Keys drove with disregard for the safety of others.

The evidence also supports the trial court's finding that defendant's driving was a proximate cause of the deaths of the two teens. Proximate cause is an element of vehicular homicide. "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. Gantt*, 38 Wn. App. 357, 359, 684 P.2d 1385 (1984). The only causal connection the State needs to prove in a vehicular homicide case "is the connection between the act of driving and the death." *State v. Lopez*, 93 Wn. App. 619, 624, 970 P.2d 765 (1999) (citing *State v. Rivas*, 126 Wn.2d 443, 451, 896 P.2d 57 (1995)).

There may be more than one proximate cause of a death, and for vehicular

homicide, a concurring cause does not shield a defendant from a vehicular homicide conviction. *State v. Roggenkamp*, 153 Wn.2d 614, 631, 106 P.3d 196 (2005). To constitute a defense, there must be an intervening and superseding cause without which the defendant's negligence would not have caused the accident. *State v. Roggenkamp*, 115 Wn. App. 927, 945, 64 P.3d 92 (2003), *aff'd*, 153 Wn.2d 614. "To be a superseding cause sufficient to relieve a defendant from liability, an intervening act must be one that is not reasonably foreseeable." *Id*. If the cause is not reasonably foreseeable, 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 that injury. *Id*. at 945-46.

In *Escobar*, the Court of Appeals affirmed that the accidental death of one of two friends racing on a public highway was proximately caused by the other's conduct. The victim, Ayon, had entered the lane of oncoming traffic in an attempt to pass Escobar, collided head on with a car driving in the opposite direction, and was killed. The court held that Escobar's driving was a proximate cause of Ayon's death:

> Had Mr. Escobar not been racing, or had he been going at the legal rate of speed instead of accelerating, the opportunity for the passing car to pull back into the proper lane of travel prior to the collision would have been greatly enhanced and the accident avoided. The accident reconstruction expert indicated that because of the parties' excessive speeds, Mr. Escobar's rapid acceleration on Mr. Ayon's right, cutting off escape, and the split-second reaction times involved at those speeds, a collision became inevitable the moment Mr. Ayon began to pass. Upon this basis, we hold the court could find Mr. Escobar's driving was a proximate cause of the collision and the ensuing death. Because Mr. Escobar was racing, Mr.

Ayon could not avoid the collision and died.

30 Wn. App. at 139.

Similarly here, Prominski would have had no reason to move into the oncoming lane of traffic at an excessive rate of speed, catching his tire in the dirt or bottoming out in the dip, had he not been trying to pass his speeding friend. As noted earlier, substantial evidence supports the trial court's finding that Keys and Archer should have and did expect that Prominski would attempt to pass a second time after Keys thwarted his first attempt.

III

Keys' next assignment of error is to the fact that the trial court failed to enter written findings to support its conclusions of law that the State had proved the reckless endangerment counts beyond a reasonable doubt. The court's findings and conclusions entered following the trial were organized into a section I, comprising 33 findings; a section II, incorporating by reference its earlier, oral findings; a section III, ruling on the defendant's motions in limine; and a section IV, comprising its conclusions of law.

Within its conclusions of law, the court summarized the facts that it relied upon for its conclusion that Keys was driving with disregard for the safety of others. It entered no such summary statement with respect to the facts relied upon for its conclusion that Keys was guilty of reckless endangerment. Instead, it stated only that

> the following elements [of reckless endangerment] have been proven by the State beyond a reasonable doubt:
> . . . .
> 3. Count III:
> 3.a That on or about February 14, 2010, the defendant acted recklessly;
> 3.b That such reckless conduct created a substantial risk of death or serious physical injury to Levi M. Sanchey;
> 3.c That the defendant's act occurred in the State of Washington.
> 4. Count IV:
> 4.a That on or about February 14, 2010, the defendant acted recklessly;
> 4.b That such reckless conduct created a substantial risk of death or serious physical injury to [Tim Archer];
> 4.c That the defendant's act occurred in the State of Washington.

CP at 63-64.

CrR 6.1(d) requires entry of written findings of fact and conclusions of law following a bench trial. *State v. Head*, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). The purpose for requiring findings and conclusions is to "enable an appellate court to review the questions raised on appeal." *Id.* at 622. Each element must be addressed individually, setting out the factual basis for each conclusion of law. *Id.* at 623; *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). Each finding must also specifically state that an element has been met. *Banks*, 149 Wn.2d at 43 (citing *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995)). Absent prejudice to a defendant from the failure to enter the findings and conclusions, the proper remedy is remand to the trial court for entry of findings. *Head*, 136 Wn.2d at 624.

Remand is not required if the failure to comply with CrR 6.1(d) is harmless, however. *Banks*, 149 Wn.2d at 43-44. To determine whether an error is harmless, we examine "'"whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" *Id.* at 44 (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999))).

In announcing its verdicts orally, the court recounted its findings and stated, "Therefore[,] Mr. Keys is guilty beyond a reasonable doubt of all of the elements of vehicular homicide by driving with disregard for the safety of others in two counts," and then continued:

> He is also guilty under the same facts of reckless endangerment against the two passengers who survived in two separate units of prosecution for those two passenger victims.

III RP (Feb. 22, 2011) at 508.

Where a trial court's written findings are incomplete or inadequate, we may look to the oral findings to aid our review. *State v. Robertson*, 88 Wn. App. 836, 843, 947 P.2d 765 (1997). In light of the detailed findings of fact that were not specific to any count, the court's incorporation by reference of its oral findings explaining that it was relying on the same facts in finding Keys guilty of all crimes charged, and its summary of the facts relevant to its finding of guilt for vehicular homicide, we have a sufficient

understanding of the trial court's reasoning and decision to review the questions on appeal. It is unnecessary to remand for additional findings.

IV

We turn last to Keys' assignment of error to the trial court's treating vehicular homicide by disregard as a violent offense and, on that basis, imposing an 18-month term of community custody. In *State v. Stately*, 152 Wn. App. 604, 608-10, 216 P.3d 1102 (2009), Division Two of this court held that when the means found is "disregard for the safety of others," vehicular homicide is not a violent offense. The State concedes that the term of community custody is excessive on this basis. We accept the State's concession that the crime is properly classified as a "crime against persons" subject to a one-year term of community custody under RCW 9.94A.701(3)(a).

We remand for correction of the term of community custody but otherwise affirm the judgment and sentence.

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

_____
Siddoway, J.

WE CONCUR:

_____
Korsmo, C.J.

_____
Brown, J.