SUPREME COURT NO. 101526-7
COURT OF APPEALS NO. 55153-5-II
(Consol. w/ 55626-0-II)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE CLARK SMITH,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Daniel Stahnke, Judge

PETITION FOR REVIEW

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RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Lawrence Clark Smith, the appellant below, seeks review of the Court of Appeals decision in State v. Smith, noted at 23 Wn. App. 2d 1007, 2022 WL 3210972, No. 55153-5-II (Aug. 9, 2022),[1] following the grant of Mr. Smith's motion for reconsideration and the amendment of the decision on November 8, 2022.[2]

B. ISSUES PRESENTED FOR REVIEW

1. When affirmative defenses are completely denied to the accused in error, and the accused has no opportunity to present his theory of the case to the jury, is the reviewing court entitled to substitute its judgment for the jury and hold the error was harmless or does harmlessness turn on whether the accused

[1] The Court of Appeals August 9, 2022 decision is attached as Appendix A.

[2] The Court of Appeals November 8, 2022 order granting reconsideration and amending the decision is attached as Appendix B.

still had an opportunity to cogently present his theory(ies) of the case?

2. Because Mr. Smith was completely denied the opportunity to present his defense theory by denying the affirmative defense instructions altogether, was this error emphatically not harmless?

3. Because of the conflict between the Court of Appeals decision and published decisions of the Court of Appeals and the Washington Supreme Court on the correct constitutional harmlessness analysis, should review be granted pursuant to RAP 13.4(b)(1), (2), and (3).

C. STATEMENT OF THE CASE

This case situates us on the onramp from Padden Parkway in Vancouver onto Interstate 205 on Friday, September 14, 2018 shortly after 5:00 p.m. RP 297-98, 393. The onramp is a little more than a quarter mile long, its asphalt width is consistently about 28 feet, and its painted lane of travel is between 16 and 19 feet throughout. RP 576, 721-22. Robert Bergstrom drove a blue

Acura that was five feet, six or seven inches wide. RP 668. Lawrence Smith drove a Dodge Cummins 3600 one-ton pickup truck with a service box on its rear. RP 721, 759. And the injured party, Isom Clemons, who collided with Mr. Bergstrom's vehicle, drove his motorcycle. RP 382-84. Mr. Bergstrom and Mr. Smith were charged and stood trial together, both for vehicular assault against Mr. Clemons. CP 1.

The pertinent events began in the righthand turn lane from Padden Parkway onto the I-205 northbound onramp. Mr. Smith testified that Mr. Bergstrom crossed two lanes of traffic to get into the right lane just before turning onto the onramp, cutting him off. RP 765-66, 783. Mr. Bergstrom acknowledged that he did cut over through traffic, but said it was at the beginning of the righthand turn lane, about 12 car-lengths from the onramp itself. RP 816-17, 857-58, 893, 964-65, 967.

Mr. Smith was then behind Mr. Bergstrom on the onramp. He openly acknowledged he was irritated by being cut off and

was following too close in his statement to police and during his testimony at trial. RP 788

Mr. Bergstrom testified he had said "brake checked" or "tapped" on the brakes without slowing at least twice while Mr. Smith followed. RP 821-22, 956, 979. Witnesses were consistent that there was no need for him to brake at all because no car was in front of him and he was on an onramp to a freeway. RP 485-86, 628, 767, 771. Mr. Bergstrom's unnecessary braking caused Mr. Smith to have to slam moderately and then hard on his brakes. RP 766-76. The second time Mr. Bergstrom engaged his brakes, Mr. Bergstrom said he saw the truck behind him "nosedive" from having to brake so hard. RP 821. Mr. Smith described having to "anchor" his brakes and ended up only five or six feet from the Acura. RP 624, 772-73.

To avoid an accident and unsure, Mr. Smith took evasive action by driving off to the righthand shoulder to avoid being directly behind Mr. Bergstrom's vehicle. RP 773. Mr. Smith testified that they were side by side—"His tail lights were about

the back of my cab"—for a few seconds. RP 795-96. Mr. Bergstrom flipped Mr. Smith off. RP 775-76, 823. Mr. Smith testified he had momentarily increased his speed to try to get around Mr. Bergstrom. RP 803-04. But the Acura accelerated away and then lost control, fishtailed, and shot off like a rocket off the left side of the onramp, through vegetation, and out onto the rightmost lane of I-205, where Mr. Clemons was traveling. RP 384-85, 398, 422-23, 467, 776. Mr. Smith was six or eight car lengths behind the Acura when it veered off the road. RP 778. Mr. Clemons hit the Acura, rolled over the windshield, and then rolled onto the highway, which caused serious injuries. RP 384-88, 825.

Mr. Bergstrom, as noted, acknowledged braking unnecessarily to send a message to the truck behind him. RP 821, 979. He said the truck drove off to the shoulder on the right very close beside him and then attempted to force him off the roadway toward the left. RP 823-24. He said he saw the driver, who was very angry and flipped him off. RP 823-24. He

testified he hit gravel and thought he had been hit by the truck; he lost control, fishtailed, overcorrected, and veered off the roadway. RP 825.

Witness accounts were mixed. One witness was in front of Mr. Bergstrom and Mr. Smith, far enough ahead that at times she could not see their vehicles given the onramp's curves. RP 397-98. She noticed that she thought the truck was following too close and then saw the pickup try to pass the car on the driver's side, rather than on the right side. RP 398, 411. She was alarmed by the passing attempt. RP 398. As she proceeded onto the freeway, she witnessed the smaller vehicle "come out and get hit by everybody," noting "surprise at how fast because it came through the trees." RP 398, 409; accord RP 422 (another witness stating, "I saw a blue car in the air coming through the trees towards the freeway").

Another witness saw the little car hit his brakes on the onramp and the truck going to the right side to pass. RP 463. He said the truck got side by side but never got past the blue car

because the blue car accelerated to get ahead. RP 504, 510. He denied seeing the truck having to slam on its brakes. RP 471. This witness, Kevin Snyder, noticed that the blue car driver was Mr. Bergstrom, his coworker; Mr. Snyder called Mr. Bergstrom at the scene to see if he was all right. RP 476-77. Mr. Snyder testified that the truck was trying to push the car off the roadway, and the car hit gravel, fishtailed, and shot off the roadway. RP 507. He said that after, he approached the driver of the truck, who had slowed, and told him to stay at the scene; Mr. Smith did stay at the scene, talked to law enforcement, and was free to leave. RP 308, 467.

Mr. Smith presented an expert accident reconstructionist, Wayne Slagle. Mr. Slagle opined that the truck could not have been next to the Acura at the time the Acura fishtailed and lost control as Mr. Bergstrom and Mr. Snyder described because the physical action of fishtailing would have caused the Acura to hit the truck if they were side by side, and there was no evidence of impact. RP 726. Therefore, Mr. Slagle said it was reasonable to

conclude that the truck was fully behind the Acura when the Acura lost control. RP 726-27.

Law enforcement witnesses were inconsistent in their testimony about whether Mr. Bergstrom's high speed was a contributing factor to his loss of control. Compare RP 357-58 (trooper giving "my opinion is that he is too fast. He is out of control" and "[C]orrect" that Mr. Bergstrom was going too fast for the curve) with RP 590 (detective testifying that speed was *not* a contributing factor to the collision).

There was not much physical evidence other than tire marks where Mr. Bergstrom skidded off the onramp and then other tire marks at the scene of the collision on I-205. RP 333-57.

From the outset of trial, Mr. Smith's theory was that he acted negligently by following too closely, but that his actions did not rise to the level of recklessness of disregard for the safety of others. RP 282-89. Consistent with this theory, he intended to argue both necessity and duress to the jury, and he requested

instructions on both. RP 939-45 (oral discussion of both defenses); CP 37 (defense proposed instruction on duress).[3]

The trial court did not view the evidence in the light most favorable to the defense in evaluating necessity or duress. It got "hung up" on the third prong of necessity, "the threatened harm was not brought about by the defendant." RP 941. Counsel emphasized that that was a question for the jury to decide. RP 941. The trial court actively weighed the evidence, saying openly it was doing so. RP 942. When counsel argued that necessity applied to Mr. Smith being forced to the right by Mr. Bergstrom, the trial court disagreed, stating, "The violation of the law is somebody got hurt badly" and "He's not here for passing on the shoulder." RP 943.

As for duress, the trial court focused on bracketed language in the instruction: "The defense of duress is not

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[3] There was no proposed necessity instruction formally filed. However, counsel was clearly arguing necessity, albeit while also agreeing that the duress defense might be more appropriate. RP 939-43. The trial court explicitly denied both necessity and duress defenses. RP 945.

available if the defendant intentionally or recklessly placed himself in a situation in which it was probable that he would be subject to duress." RP 944; CP 37. The court asked how it could be that Mr. Smith didn't put himself in this situation, likening his actions to a "bumper ride." RP 944. Defense counsel repeatedly asserted that whether Mr. Smith intentionally or recklessly placed himself in a duress situation was not a legal question for the court, but a factual question for the jury. RP 944.

Mr. Smith's counsel took formal exception to the trial court's denial of the necessity and duress instructions. RP 945.

The jury found Mr. Smith guilty of vehicular assault. It acquitted Mr. Bergstrom. RP 1067-68; CP 58.

The trial court sentenced Mr. Smith to six months of work release and 12 months of community custody. RP 1085, 1091; CP 68-69.

Mr. Smith appealed. CP 71. He contended, among other things, that the trial court erred in denying the necessity and duress instructions which, in turn, denied him his Sixth

Amendment and article I, section 22 rights to present his defense theory to the jury. Br. of Appellant at 13-23.

Without deciding, the Court of Appeals presumed the trial court erred by denying Mr. Smith the duress and necessity instructions. Appendix A at 8. Despite the outright denial of these defenses altogether, the Court of Appeals determined the error was harmless. Appendix A at 9-11; Appendix B at 1-2.[4]

According to the Court of Appeals, the denial of the necessity defense "did not contribute to the verdict because the overwhelming evidence established that Smith did not simply pull to the side of the road to avoid Bergstrom's braking, but rather accelerated and attempted to pass Bergstrom on the shoulder of a highway on-ramp." Appendix B at 1. The Court of

[4] The Court of Appeals' initial harmlessness determination rested on the acquittal of Mr. Bergstrom, which the court indicated resolved the question of whether Mr. Bergstrom was driving recklessly or with disregard for the safety of others. Appendix A at 9-10. The Court of Appeals granted Mr. Smith's motion for reconsideration and deleted this reasoning, replacing it with a discussion of what a "reasonable jury" would not have found had it considered the defenses of duress and necessity. Appendix B at 1-2.

Appeals stated that no reasonable jury could "find that there was no reasonable legal alternative to this action because Smith could have slowed down or pulled to the side of the road and slowed down in order to create additional space between his car and Bergstrom's car until they got on to I-205." Appendix B at 1.

Similarly with respect to the denial of the duress defense, the Court of Appeals determined that Mr. Smith's "accelerating and attempting to pass Bergstrom[ ]was not necessitated by the duress involved" because Mr. Smith could have slowed down or pulled over. Appendix B at 2.

D. ARGUMENT IN SUPPORT OF REVIEW

The Court of Appeals' harmlessness analysis usurps the role of the jury, erroneously weighs the evidence, and conflicts with constitutional precedent of the Washington Supreme Court and Court of Appeals, meriting review

Washington courts review de novo whether a defendant has been denied his constitutional right to present a defense. State ex rel. Haskell v. Spokane County Dist. Ct., 198 Wn.2d 1, 12, 491 P.3d 119 (2021). The Sixth Amendment and article I,

sections 21 and 22 guarantee the right to trial by jury and to defend against criminal allegations. Id. "'A defendant's right to *an opportunity to be heard in his defense*, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence.'" Id. (emphasis added) (quoting State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)).

In State ex rel. Haskell, the Washington Supreme Court considered the wholesale denial of a necessity defense, interpreting the evidence most strongly in favor of the defendant and refusing to weigh the evidence, "which is an exclusive function of the jury." 198 Wn.2d at 12. Where a question of fact exists as to the reasonable legal alternatives in support of the defense, this question must be put to the jury. Id. at 14. Notably, the court did not speculate about what the jury might have determined had the necessity instruction actually been given, nor did the court engage in any harmlessness analysis. The harm was the wholesale denial of the affirmative defense.

More recently, the Washington Supreme Court considered the harmlessness of denying an entrapment defense instruction in State v. Arbogast, 199 Wn.2d 356, 378, 506 P.3d 1238 (2022), where the defendant met his burden of production to support the defense given that the criminal design to have sex with children originated in the mind of an undercover police officer posing as the children's mother. In addressing the state's claim of harmless error, the Arbogast court emphasized "whether the evidence meets the burden of proof by a preponderance is reserved for the jury." Id. at 381. The state argued that the error was harmless "because the jury necessarily rejected Arbogast's defense that he did not intend to have sex with children in convicting him of attempted child rape." Id. "Essentially, the State's argument is that Arbogast presented evidence amounting to entrapment, which the jury rejected when it convicted him. But the jury was not instructed on the law of entrapment." Id.

The Arbogast court stressed the importance of providing proper legal instruction to the jury, holding that it could not be

harmless to leave the jury "without an instruction explaining the elements of entrapment or how the evidence presented would related to those elements." Id. Instructional error is harmless if it trivial, formal, or merely academic given the theory of the case. Id. at 382. "The failure to instruct on entrapment was far from trivial or merely academic here; it precluded Arbogast from contextualizing the evidence with the law and prevented him from presenting the defense he wished." Id. at 382.

The Ninth Circuit Court of Appeals has even more emphatically rejected harmlessness analysis where the jury is not instructed on the defendant's theory of the case. In the context of an alibi defense, "failure to instruct the jury on the defendant's theory of the case, where there is evidence to support such instruction, is reversible per se and can never be considered harmless error." United States v. Zuniga, 6 F.3d 569, 572 (9th Cir. 1993). "'The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support

the instruction can never be considered harmless error.'" Id. at 571-72 (quoting United States v. Escobar de Bright, 742 F.2d 1196, 1201 (9th Cir. 1994)).

The Washington Supreme Court and Court of Appeals have reached similar conclusions in other contexts. In State v. Coristine, 177 Wn.2d 370, 376, 300 P.3d 400 (2013), the court considered an affirmative defense that was given over the defendant's objection. The error alleged was depriving the defendant of his right to control the nature of his defense. Id.; accord McKaskle v. Wiggins, 465 U.S. 168, 177, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) ("[T]he primary focus must be on whether the defendant had a fair chance to present his case in his own way."). This error was not harmless even though the affirmative defense forced upon Coristine consisted of an accurate statement of the law and was supported by the evidence. Coristine, 177 Wn.2d at 381. "[T]he injury was not to Coristine's right to be tried by a jury applying accurate instructions of law. Instead, the trial court erred by denying Coristine his Sixth

Amendment right to mount the defense of his choosing." Id. Because Coristine lost the ability to control his defense altogether, the error was not harmless beyond a reasonable doubt.

The Court of Appeals determined that failure to instruct the jury on consent was harmless in an indecent liberties case. State v. Buzzell, 148 Wn. App. 592, 600-01, 200 P.3d 287 (2009). The court pointed out that Mr. Buzzell was still able to present his theory of the case—consent to sexual contact—even without an instruction defining the term "consent." Id. at 601. Defense counsel argued that the contact was consensual in closing and the prosecution also addressed the concept of consent. Id. Because the case turned on which version of events to believe and because the jury heard from both parties about the role consent played in making this determination, the error denying Mr. Buzzell a specific instruction on consent did not deprive him from asserting his theory and therefore was harmless beyond a reasonable doubt. Id.

Turning to this case, the Court of Appeals' harmlessness analysis rested on its determination that no reasonable jury could have found either the defenses of necessity or duress by a preponderance of the evidence. As for necessity, the Court of Appeals determined that a reasonable jury could not find that Mr. Smith's swerving to the right was a reasonable legal alternative because Mr. Smith could have instead pulled over or slowed down. Appendix B at 1. But Mr. Smith's testimony, corroborated by Mr. Bergstrom's, was that he was mere feet away from the rear of Mr. Bergstrom's car when he verged to the right to attempt to pass to avoid a collision. RP 624, 771-73 (Mr. Smith's testimony he was too close to Mr. Bergstrom's car and was uncertain whether Mr. Bergstrom would continue brake checking him), 821, 979 (Mr. Bergstrom acknowledging Mr. Smith had to slam on his brakes causing Mr. Smith's truck to "nosedive"). The cars were side-by-side for only a few seconds before Mr. Bergstrom accelerated and put more distance between them. RP 775-76, 778, 795-96. At the moment when Mr. Smith

moved to the side in a momentary attempt to get past Mr. Bergstrom, it is at least debatable whether a reasonable legal alternative existed to avoid collision. Mr. Smith testified that he would have collided with Mr. Bergstrom had he not moved out from behind Mr. Bergstrom's vehicle. The Court of Appeals is simply wrong to conclude that a reasonable jury could not have found that no reasonable legal alternative existed.

The Court of Appeals' factual analysis of duress is similarly incorrect, concluding that Mr. Smith could have responded to the threat posed by Mr. Bergstrom by slowing down or pulling over rather than attempting to get by Mr. Bergstrom. Appendix B at 2. In a split second decision where the car in front of Mr. Smith was slamming on its brakes and causing Mr. Smith's large truck to nosedive, a jury could reasonably conclude that the few seconds it took Mr. Smith to move to the right in an attempt to avoid collision and surpass Mr. Bergstrom's vehicle was necessitated by duress caused by Mr. Bergstrom's braking

behavior. The Court of Appeals is similarly wrong to suggest that no reasonable jury could have found the elements of duress.

The Court of Appeals presumed that the necessity and duress instructions were warranted by the evidence and that it was error not to give them. In such circumstances, harmlessless analysis does not turn on the reviewing court's assessment of what it believes a reasonable jury would determine had it been instructed in a manner that comported with the defendant's constitutional rights. Rather, harmlessness turns on whether the defendant still had the opportunity to present his theory of the case to the jury despite the absence of instructions to support that theory. The Court of Appeals' entire discussion of harmlessness is incorrect.

The Court of Appeals decision conflicts with all the cases discussed above. In State ex rel. Haskell, the error of categorically denying the necessity defense to the defendant required reversal because the question should have been put to the jury to decide, period. 198 Wn.2d at 18. In Arbogast,

likewise, where the jury was not instructed on the defense theory of the case and was left without any explanation on the elements of the chosen defense altogether, it precluded the defendant "from contextualizing the evidence with the law and prevented him from presenting the defense he wished." 199 Wn.2d at 382. Albeit in the context of forcing an affirmative defense upon the defendant, the Supreme Court has recognized it is not harmless to deny the defendant his right to mount the defense of his choosing. Coristine, 177 Wn.2d at 381. The same errors that occurred in Arbogast and State ex rel. Haskell (and a similar error that occurred in Coristine) occurred here yet the Court of Appeals reached a different result. This merits review of the incorrect constitutional harmlessness analysis proffered by the Court of Appeals pursuant to RAP 13.4(b)(1) and (3).

Buzzell provides a useful contrast in its discussion of harmlessness. The Court of Appeals there recognized the principles espoused in Arbogast and Haskell that the defendant was entitled to control his defense. But where the defendant was

actually able to argue his consent defense thoroughly and was merely denied an instruction defining the term "consent," the error in denying the instruction was harmless. The Buzzell court would have necessarily reached a different conclusion if the defense was categorically denied his ability to present his chosen theory to the trier of fact, as occurred in Mr. Smith's case.

Because the Court of Appeals decision conflicts with the constitutional decisions of the Washington Supreme Court and Court of Appeals, review should be granted pursuant to RAP 13.4(b)(1), (2), and (3).

E. CONCLUSION

The Court of Appeals' harmlessness analysis usurps the role of the jury and entirely deprives Mr. Smith of any opportunity to present his supportable defense theories of necessity and duress to a jury. Because the Court of Appeals decision conflicts with the constitutional precedent of the Supreme Court and Court of Appeals, Mr. Smith asks that review be granted under RAP 13.4(b)(1)-(3).

DATED this 8th day of December, 2022.

I certify this document contains 3,980 words. RAP 18.17.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

August 9, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LAWRENCE CLARK SMITH, Appellant.	No. 55153-5-II (Consolidated with 55626-0-II) UNPUBLISHED OPINION

PRICE, J. — Lawrence C. Smith appeals his conviction for vehicular assault, arguing that the trial court denied his right to present a defense by refusing to instruct the jury on duress and necessity. Smith also appeals his legal financial obligations (LFOs), arguing the trial court erred by imposing restitution and community custody supervision fees.

Any error in the jury instructions was harmless. The amount of restitution was not supported by sufficient evidence, and the State concedes that the community custody supervision fees should be stricken. Therefore, we affirm Smith's convictions, reverse the imposition of restitution to Anthem PPO and community custody supervision fees, and remand for further proceedings consistent with this opinion.

FACTS

On May 7, 2019, the State charged Smith and Robert Bergstrom with vehicular assault for a vehicular accident that injured Isom Clemons. The case proceeded to a joint jury trial with Smith and Bergstrom as co-defendants.

Trooper Chad Prentice of the Washington State Patrol (WSP) testified that he was dispatched to an incident on September 14, 2018. Dispatch advised that there had been a collision involving a motorcycle on northbound Interstate 205 (I-205).

Clemons testified that he was riding his motorcycle through Vancouver, Washington. As Clemons was riding down I-205, he was hit by a blue car from the right side. Clemons sustained extensive injuries to his back, hip, and leg.

Becky Bellamy witnessed the accident when she was driving home from work. Bellamy testified that she was on the on-ramp to I-205 when she looked in her rear view mirror and saw a truck following a sedan "really close." 2 Verbatim Report of Proceedings (VRP) at 395. When Bellamy checked her mirror again she was surprised by how close the truck was to the sedan. Bellamy lost sight of the vehicles briefly going through a turn and when she saw them again, the truck was attempting to pass the sedan on the inside of the on-ramp. After Bellamy merged onto I-205, she checked her mirror and saw the sedan coming out of the shrubbery on the shoulder of the highway and across the lanes of traffic.

Allyson Terry also witnessed the accident. Terry testified she was driving on I-205 when she saw "a blue car in the air coming through the trees towards the freeway." 2 VRP at 422. The car hit a motorcycle directly in front of Terry. Terry was able to stop her car and go attempt to assist the motorcyclist. Terry also checked on the driver of the blue car. The driver was very upset about the accident. Terry testified that she overheard the driver on the phone say "that he brake checked somebody . . . ." 2 VRP at 425.

Kevin Snyder testified that he was getting on I-205 when the two cars in front of him caught his attention. Snyder observed a red truck following a blue car by approximately half a car length. On the on-ramp, Snyder saw the brake lights on the blue car light up. The red truck got even closer to the blue car and the blue car's brake lights lit up again. Then the red truck pulled to the right and crossed the fog line to try to pass the blue car. Snyder testified:

> And as they made the corner and they—they kind of straightened out again, basically he ran out of road. That's when the blue car went off the road and shot through the trees and entered into [I-205].

2 VRP at 464. Snyder saw the blue car collide with the motorcycle. Snyder also saw the red truck stop on the side of the road, and he stopped his vehicle to contact the driver. The driver told Snyder he was upset because he had been cut off. Later, Snyder realized the driver of the blue car was Bergstrom, who Snyder knew from work.

Sergeant Justin Maier of the WSP was assigned as the lead detective to investigate the collision. As part of his investigation, Sergeant Maier interviewed Bergstrom and Smith.

Smith confirmed with Sergeant Maier that he was driving the red truck. Smith told Sergeant Maier that he turned onto the on-ramp for I-205 and was following behind a blue car. Smith stated that he was following approximately 10 feet behind the blue car. Smith said that while following the blue car, he had to brake hard twice. After the second time he had to brake, Smith accelerated and pulled alongside the blue car. Then the blue car accelerated and went off the road.

Bergstrom told Sergeant Maier that he was driving the blue car. Bergstrom explained that traffic was getting congested in the right lane to enter the on-ramp so he moved over two lanes, thinking he would have enough time to get back into the lane for the on-ramp. Bergstrom then

moved across two lanes of traffic to get back into the lane for the on-ramp. When he got back into the lane for the on-ramp, a red truck was behind him. Maier testified that

> [Bergstrom] said while that red pickup truck was behind him, he applied—or he tapped his brakes one time. And at that point the pickup truck pulled to the right shoulder. He accelerated and got into the gravel on the left shoulder, felt his vehicle begin to fishtail, and he over-corrected, went off the road to the left and out into [I-205].

2 VRP at 586-87. When Bergstrom's car entered I-205, it collided with a motorcycle. As the interview progressed, Bergstrom admitted that he had braked twice when the red truck was behind him.

Smith presented the testimony of Wayne Slagle, an expert in accident reconstruction. Slagle testified there was enough room on the on-ramp for the red truck to pull alongside the blue car. Slagle also testified that it was reasonable to conclude that the driver of the blue car lost control and left the road. Further, Slagle opined that the red truck was behind the blue car when the driver of the blue car lost control. Slagle did not believe that the red truck would have been pushing the blue car off the roadway when the driver of the blue car lost control.

Smith also testified. Smith testified that he was driving home from work when he entered the turn lane to get onto the I-205 on-ramp. When Smith was entering the on-ramp, a blue car came from the far left lane across to enter the on-ramp in front of Smith. Smith was approximately 10 to 12 feet behind the blue car. Smith was "brake checked" by the blue car in front of him. 3 VRP at 769. Then the blue car braked again. Smith had to brake hard enough that his lunch pail slid off the front seat. Smith also testified that his truck "nose dived" when he braked abruptly. 3 VRP at 771. Because Smith was not sure what the driver of the blue car was going to do next, he took "evasive action" and moved to the side of the road. 3 VRP at 773. When Smith pulled

alongside the blue car, the driver "flip[ped him] off." 3 VRP at 776. Then the blue car accelerated and started to "fishtail." 3 VRP at 776. Smith slowed down while the blue car lost control and came out onto I-205. Smith testified that his vehicle never contacted the blue car. Smith explained:

> I pulled to the shoulder of the road to get away from [the blue car], to get out of harm's way.
>
> . . . .
>
> He accelerated away from me.

3 VRP at 781. On cross-examination, Smith admitted he pulled to the right shoulder and accelerated to get around the blue car in order to get away from him.

Finally, Bergstrom testified. Bergstrom was travelling in the left lane believing that he would be able to get over to the on-ramp for I-205. He saw a large enough space and moved into the middle lane. Then he moved into the right lane to enter the on-ramp. Once Bergstrom was on the on-ramp, he noticed a red truck right behind him. Bergstrom tapped his brake just so the light would turn on but did not slow down. Bergstrom testified his intent was to let the truck know that it was too close. Bergstrom tapped his brakes twice but never actually slowed down. Then the red truck pulled alongside the right side of his car. Bergstrom testified he made a gesture to ask what the driver was doing but did not flip him off. Bergstrom was scared and believed the truck continued to get closer to him rather than passing. Then Bergstrom's car hit gravel and Bergstrom lost control, went into the bushes, and ended up hitting the motorcycle.

After the close of testimony, the parties discussed jury instructions. Smith originally argued for a necessity instruction. The State argued that necessity was not appropriate in Smith's case. And the trial court expressed concern about giving the instruction because necessity required

that the threatened harm was not brought about by the defendant. The trial court also noted that the violation of law at issue in the case was an accident causing serious injury—not attempting to pass on the shoulder. Smith then moved on to argue duress:

> I request leave to do exactly what [the prosecutor] said. And I appreciate that. I think the duress instruction is more appropriate. Could we look at 18.01?

3 VRP at 943.

Smith proposed a jury instruction for duress that stated:

> Duress is a defense to a charge of Vehicular Assault if:
>
> (a) The defendant participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that in case of refusal [the defendant] [or] [another person] would be liable to immediate death or immediate grievous bodily injury; and
>
> (b) Such apprehension was reasonable upon the part of the defendant; and
>
> (c) The defendant would not have participated in the crime except for the duress involved.
>
> [Threat means to communicate, directly or indirectly, the intent to cause death or grievous bodily injury]
>
> [The defense of duress is not available if the defendant intentionally or recklessly placed [himself] [herself] in a situation in which it was probable that [he] [she] would be subject to duress]
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

Clerk's Papers (CP) at 37 (brackets in original). The trial court concluded that the duress defense did not apply because Smith intentionally or recklessly placed himself in the situation and denied the requested instruction.

The jury found Smith guilty of vehicular assault. The jury also entered a special verdict finding that Smith operated his vehicle in a reckless manner and with disregard for the safety of others. The jury found Bergstrom not guilty.

The trial court sentenced Smith to six months of work release. The trial court found Smith indigent. The trial court also imposed 12 months of community custody. One condition of community custody required Smith to pay supervision fees as determined by the Department of Corrections.

The State also requested over $30,000 in restitution. The restitution report requested $25,094.58 for Anthem PPO, Clemons' insurance company. Clemons submitted a restitution estimate form stating that Anthem PPO paid $25,094.58. The form was signed under the penalty of perjury. And the restitution report included an explanation of benefits—payments showing the amount of hospital charges for Clemons.

At the restitution hearing, the State relied on the signed restitution estimate to support imposition of the $25,094.58. Smith argued that the information in the restitution report was insufficient to prove the amount of restitution. Specifically, Smith argued that there was nothing in the record showing the insurance company suffered a loss and is owed the amount identified. The trial court ordered the entire amount of restitution requested, $30,729.98: $5,635.40 to Clemons and $25,094.58 to Anthem PPO.

Smith appeals.

ANALYSIS

I. JURY INSTRUCTIONS

Smith argues that the trial court erred by refusing to give the jury instructions on the defenses of necessity and duress. Assuming without deciding that Smith was entitled to jury instructions on necessity and duress, any error was harmless. Accordingly, we affirm Smith's conviction.

Assuming the jury instructions were improperly denied, we apply the constitutional harmless error standard because the failure to instruct the jury on necessity or duress denied Smith his right to present a defense. Under the constitutional harmless error standard, an instructional error is harmless if, considering the record as a whole, the error is harmless beyond a reasonable doubt. *State v. Grimes*, 165 Wn. App. 172, 187, 267 P.3d 454 (2011), *review denied*, 175 Wn.2d 1010 (2012). "To find an error harmless beyond a reasonable doubt, an appellate court must find that the alleged instructional error did not contribute to the verdict obtained." *Id.* at 187-88.

A. NECESSITY JURY INSTRUCTION

> The Washington Pattern Jury Instruction on necessity states:
>
> Necessity is a defense to a charge of (fill in crime) if
>
> (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm;
>
> (2) harm sought to be avoided was greater than the harm resulting from a violation of the law;
>
> (3) the threatened harm was not brought about by the defendant; and
>
> (4) no reasonable legal alternative existed.

> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 305 (5th ed. 2021) (boldface omitted).

Here, the jury acquitted Bergstrom of vehicular assault, demonstrating that the jury found that Bergstrom was not driving recklessly or driving with disregard for the safety of others. This acquittal resolves the question. If the jury did not find that Bergstrom was driving recklessly or with disregard for the safety of others, then the jury could not have found beyond a reasonable doubt that Smith reasonably believed that he was acting to avoid or minimize any harm or threatened harm caused by Bergstrom. Therefore, the jury's acquittal of Bergstrom shows that the failure to give a necessity instruction did not contribute to the jury's verdict finding Smith guilty of vehicular assault. Because the failure to give the necessity jury instruction did not contribute to the jury's guilty verdict, any error in failing to give the instruction was harmless beyond a reasonable doubt.

B. DURESS JURY INSTRUCTION

> To establish the defense of duress, a defendant must show that
>
> (a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and
>
> (b) That such apprehension was reasonable upon the part of the actor; and
>
> (c) That the actor would not have participated in the crime except for the duress involved.

RCW 9A.16.060(1). However, the "defense of duress is not available if the actor intentionally or recklessly places himself or herself in a situation in which it is probable that he or she will be subject to duress." RCW 9A.16.060(3).

Here, the jury heard all the evidence and acquitted Bergstrom while finding Smith guilty of vehicular assault. As it was with necessity, the jury's verdict acquitting Bergstrom shows, beyond a reasonable doubt, that a duress instruction would not have changed the outcome in Smith's trial. In order for Smith's duress instruction to change the outcome of the trial, the jury would have had to find that Bergstrom's actions were a threat that "created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury[.]" RCW 9A.16.060(1). A threat encompasses both direct and indirect communications. *State v. Harvill*, 169 Wn.2d 254, 260, 262, 234 P.3d 1166 (2010).

Under the evidence in this case, the only threat that would support Smith's duress defense is Bergstrom's alleged "brake checking"—an indirect communication to stop following so closely or there will be a car accident. However, under the facts of this case, the jury would have had to find that braking to threaten another driver was reckless driving, a disregard of the safety of others, and a cause of the ultimate collision with Clemons. But by acquitting Bergstrom, the jury found beyond a reasonable doubt that Bergstrom did not drive recklessly, with disregard for the safety of others, or cause the collision with Clemons. Thus, we are convinced beyond a reasonable doubt that the jury would not have found Smith proved the defense of duress had the trial court given such an instruction. Accordingly, any failure in giving the duress instruction did not contribute to the verdict and was harmless.

In addition to the jury's acquittal of Bergstrom, the jury's implicit rejection of Smith's credibility also supports the conclusion that the failure to give Smith's proposed duress instruction was harmless. There is an element of subjectivity in proving a duress defense because the threat must create "an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury." RCW 9A.16.060(1). Therefore, to find that Smith proved his defense of duress, the jury would have to find Smith's claim that Bergstrom's braking actually caused him to fear an immediate car accident. However, because the jury appears to have found Smith's testimony and account of the incident not credible, it is unlikely that it would have accepted his assertion that he acted out of apprehension that Bergstrom's braking would cause an accident. Accordingly, the jury's credibility determination is further support for determining that the trial court's failure to give the duress instruction was harmless.

II. RESTITUTION

Smith argues that the evidence supporting restitution to Anthem PPO was not supported by sufficient evidence because there was no evidence establishing the actual costs or payments made by Anthem PPO. We agree.

The State must prove the amount of restitution by a preponderance of the evidence. *State v. Deskins*, 180 Wn.2d 68, 82, 322 P.3d 780 (2014). " 'Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.' " *Id.* at 82-83 (internal quotation marks omitted) (quoting *State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 C. Ct. 2546, 165 L. Ed. 2d 466 (2006)). Claimed losses must be

supported by substantial credible evidence. *Id.* at 82. "Courts may rely on a broad range of evidence—including hearsay—because the rules of evidence do not apply to sentencing hearings." *Id.* at 83.

Here, the only evidence supporting the award of restitution is Clemons' estimate of what a third party paid a different third party—stating that Anthem PPO paid $25,094.58. Although the State also included a list of hospital charges, there was no itemized list of actual payments made by Anthem PPO. The State only presented evidence of what Clemons believed Anthem PPO paid, but there is no indication of where Clemons received that information or substantial credible evidence showing what losses Anthem PPO actually incurred. Therefore, the State failed to establish the amount of restitution owed to Anthem PPO. We reverse that amount of restitution and remand for further proceedings.

III. COMMUNITY CUSTODY SUPERVISION FEES

Smith argues that the community custody supervision fees should be stricken from his judgment and sentence because the trial court did not intend to impose any discretionary LFOs. The State concedes that the trial court intended to waive discretionary LFOs and agrees that the community custody supervision fees should be stricken.

Community custody supervision fees are discretionary LFOs. *State v. Starr*, 16 Wn. App. 2d 106, 109, 479 P.3d 1209 (2021). The trial court intended to waive discretionary fees. And the State concedes that the community custody supervision fees should be stricken. We accept the State's concession and remand to strike the community custody supervision fees.

We affirm Smith's convictions, reverse the imposition of restitution to Anthem PPO and community custody supervision fees, and remand for further proceedings consistent with this opinion.

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 in accordance with RCW 2.06.040, it is so ordered.

Price, J.

PRICE, J.

We concur:

Glasgow, CJ

GLASGOW, C.J.

J, J

LEE, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two
November 8, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LAWRENCE CLARK SMITH, Appellant.	No. 55153-5-II (Consolidated with 55626-0-II) ORDER GRANTING MOTION FOR RECONSIDERATION AND ORDER AMENDING UNPUBLISHED OPINION

Appellant, Lawrence C. Smith, filed a motion for reconsideration of this court's unpublished opinion filed on August 9, 2022. After review of the motion, answer, and the record, it is hereby

ORDERED that the motion for reconsideration is hereby granted, and the unpublished opinion previously filed on August 9, 2022, is hereby amended as follows:

> Page 9, the last paragraph of section I. A. NECESSITY JURY INSTRUCTION shall be deleted. And the following paragraph shall be inserted in its place:
>
> Here, we are convinced beyond a reasonable doubt that the failure to give a necessity instruction did not contribute to the verdict because the overwhelming evidence established that Smith did not simply pull to the side of the road to avoid Bergstrom's braking, but rather accelerated and attempted to pass Bergstrom on the shoulder of a highway on-ramp. A necessity defense requires proving by a preponderance of the evidence that no reasonable legal alternative exists to the defendant's actions. Even if the jury believed Smith's testimony that he attempted to pass Bergstrom to get away from him, a reasonable jury could not find that there was no reasonable legal alternative to this action because Smith could have slowed down or pulled to the side of the road and slowed down in order to create additional space between his car and Bergstrom's car until they got on to I-205. Based on the overwhelming evidence, including Smith's own admission, that Smith attempted to pass Bergstrom, no reasonable jury would have found that Smith met his burden to prove necessity. Accordingly, the failure to give the necessity instruction did not contribute to the verdict and any error was harmless.

Pages 10-11, the second, third, and fourth paragraphs of section I. B. DURESS JURY INSTRUCTION shall be deleted. And the following paragraph shall be inserted in their place:

Like the failure to give the necessity defense, we are convinced beyond a reasonable doubt that the failure to give the duress instruction was harmless. Duress requires the defendant to prove that he would not have participated in the crime except for the duress involved. Here, even if the jury believed that Smith reasonably believed he needed to take action to avoid the threat created by Bergstrom's braking, Smith's participation in the crime—accelerating and attempting to pass Bergstrom—was not necessitated by the duress involved. As noted above, Smith could have responded to the threat by slowing down or pulling over, he did not have to respond to whatever threat was posed by Bergstrom's braking by accelerating and attempting to pass Bergstrom. In other words, a reasonable jury would not find, even by a preponderance of the evidence, that Smith would not have participated in the crime, except for the duress involved, because it was his decision to respond to Bergstrom's braking with accelerating and attempting to pass Bergstrom. Therefore, we are convinced beyond a reasonable doubt that the failure to give a duress instruction did not contribute to the verdict. Accordingly, any error in failure to give the duress instruction was harmless.

IT IS SO ORDERED.

PANEL: Jj. GLASGOW, LEE, PRICE

Price, J.
PRICE, J.

We concur:

Glasgow, CJ
GLASGOW, C.J.

Lee, J
LEE, J.

NIELSEN, BROMAN & KOCH, PLLC

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