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STATE OF WASHINGTON
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Supreme Court No. 96847-1
(Court of Appeals No. 76340-7-I)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BRIAN J. SMITH, Appellant.

CONTINGENT CROSS PETITION FOR REVIEW

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A. IDENTITY OF CONTINGENT CROSS-PETITIONER

Contingent Cross-Petitioner, State of Washington, by Hilary A. Thomas, appellate deputy prosecutor for Whatcom County, seeks the relief designated in Part B.

B. COURT OF APPEALS DECISION

Petitioner Smith has asked this Court to review a number of issues decided by the Court of Appeals, Division I, in State v. Smith, Slip Opinion, No. 76340-7-I (Dec. 3, 2018). The decision is attached as Appendix A to Smith’s petition. As Contingent Cross-Petitioner, the State requests that, if this Court accepts review of Smith’s State v. Imokawa, 4 Wn. App. 545, 422 P.3d 502 (2018), issue regarding the State’s burden of proof regarding superseding causation and harmless error, it also accept review of the issue of whether the Court of Appeals erred in holding that the State bears the burden of such proof and that Smith may raise this issue for the first time on appeal.¹ The Court of Appeals opinion addresses this jury instruction issue at pages 23-28 of its opinion.

C. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should grant review of whether WPIC 90.07 and 90.08 adequately convey the law regarding proximate cause and superseding causes and the State’s burden of proof thereon if this Court grants review of petitioner’s issue that the Court of Appeals erred in determining that it was harmless error for the

¹ The State is not filing an answer to Smith’s petition for review unless the Court otherwise indicates it desires one.

instructions not to convey that the State bore the burden of proof regarding absence of a superseding cause.

2. If this Court accepts review of petitioner's issue that the error regarding the jury instructions on superseding causation was not harmless, whether the defendant preserved the issue for review where he invited any error regarding the lack of an adequate instruction on superseding causes by proposing the instruction he alleges was inadequate and where he failed to address whether his alleged jury instruction error was a manifest error of constitutional magnitude under RAP 2.5.

D. STATEMENT OF FACTS RELEVANT TO CONTINGENT CROSS-PETITION

Shortly after 8:30 p.m. on a December's night Petitioner Smith's SUV struck victim Schuyleman's motorcycle, which was coming from the opposite direction, at the intersection of Kale Road and Christopher Lane, a short distance beyond the town of Everson. RP 540-42, 557, 567, Ex. 2, 3, 4, 19. It was dark at the time, but the road was clear and there was very little traffic. RP 551, 557, 568-69, 577. Kale St. is a straight-a-way and during the day a person can see a far ways down the road. RP 768, Ex. 33, 35. Smith hit the motorcycle nearly head on when he began to cut the corner to turn left onto Christopher Lane.² RP 759, 775, 1099, 1302; Ex. 19, 27, 33, 35, 44³. The impact threw Schuyleman up onto the hood of Smith's SUV, shattering the SUV's windshield, bending the handlebars on

² The posted speed limit was 35 mph, but it didn't appear speed was a factor in the collision. RP 1095-96, 1120-22.

³ The blue mark is the fluid path for the SUV and resulted from radiator fluid leaking out when the radiator was damaged in the collision. RP 1089-91.

the motorcycle backward and causing damage to the motorcycle's gas tank. RP 773, 11097-09, 1111. The motorcycle was found in the westbound lane of Kale St., the opposite lane than the one in which Smith had been driving his SUV. RP 540-41, 746, 763, 1307, Ex. 19, 44.

Smith told Schuyleman at the scene that he hadn't seen him, and told officers that night he hadn't seen the motorcycle as he was turning into Christopher Lane, into his neighborhood. RP 552, 611, 818-19. He said he had been traveling eastbound, had been attempting to turn left and had to slow down for a car in the opposite lane to pass before turning. RP 819, 834. He said he thought the intersection had been clear. RP 834.

Smith told a witness at the scene something about the motorcycle coming at him, which the witness thought was odd because the motorcycle would have had the right of way as Smith was turning left. RP 1410. Smith testified he had slowed down to turn left as an oncoming vehicle passed and was just starting to turn left when he hit something. RP 1427-28.

The trooper at the scene doing accident reconstruction didn't check to see if the headlight on the motorcycle was working, but would have had to turn the motorcycle on to see if the headlight worked because there was no switch to turn it on. RP 778, 781, 1114. The motorcycle's headlight had been working earlier that day when a friend and Schuyleman were riding their motorcycles together. RP 1481-82. The friend indicated the

first thing a motorcyclist does after starting the bike is to check the headlight, and that Schuyleman would have noticed if the headlight wasn't on because it would have been impossible to see given how dark it was. RP 1482. The bike had five forward facing lights, two of which were amber. RP 1483. The two smaller white lights could be switched off but not the main headlight. RP 1483. The photos of the bike at the scene that night showed the main headlight and the two amber lights were on, as well as the taillight. RP 1484-85, Ex. 8, 10.⁴

Later when the motorcycle was being inspected in the impound lot, the headlight turned on as soon as the motorcycle was turned on. RP 1115, Ex. 53, 54. The headlight worked for a while and then it stopped working and didn't come back on. RP 1116.

A defense expert testified that the motorcycle had an after-market type hand lever shifter on it, which meant that instead of shifting with one's toe, the shifting was done with one's hand. He acknowledged, however, that there was nothing to indicate the shifter had anything to do with the collision. RP 1269-74. There was testimony that the shifter worked well. RP 1487. He also testified that the collision may have caused whatever problems there was with the headlight. RP 1276.

⁴ The State has included these facts regarding the headlight because the Court of Appeals opinion largely addressed Smith's argument below that the headlight being off could have been a superseding cause of the collision. Smith appears to have abandoned this factual argument in his petition for review.

Smith testified at trial that he'd had one beer after he ate dinner at the Rusty Wagon before he drove towards home, at 8:30 p.m., but denied having anything to drink at the BP Christmas party earlier. RP 1425-26, 1480. He admitted he lied to the officer about not having anything to drink. RP 1426, 1451. His BAC would have been .08-.11 within two hours of the collision. RP 1160.

Smith was charged with vehicular homicide, as well as obstructing a police officer. At trial Smith proposed instruction no. 9, the instruction regarding proximate cause and superseding causes, based on WPIC 90.08. CP 97, 381; RP 1516-17; Petitioner's App. D. The State did not object to the instruction being given due to the testimony, albeit limited, regarding the headlight. CP 362-79; RP 1516-17. Smith did not object to the State's instructions regarding the definition of vehicular homicide or the proximate cause instruction, based on WPIC 90.07, and did not request any further instruction on superseding intervening causes. CP 371-73; RP 1516-18, 1526. His objection to the elements instruction on vehicular homicide was based solely on his proposed instruction for what he argued was a lesser included offense on the alternative of driving with the disregard for the safety of others. RP 1515-24.

After trial, and after Smith filed his briefing at the Court of Appeals, Division II of the Court of Appeals issued its decision in State v.

Imokawa, 4 Wn. App. 545, 422 P.3d 502 (2018). The Court of Appeals in this case permitted supplemental briefing regarding the instruction issue and addressed the issue in its opinion, adopting Division II’s analysis in the Imokawa case. This Court subsequently granted the State’s petition for review in the Imokawa case and it is currently pending review. *See*, State v. Imokawa, Washington State Supreme Court No. 96217-1. That case is currently set for oral argument on May 16th.

E. REASONS WHY CONTINGENT REVIEW SHOULD BE ACCEPTED

The State is cross-petitioning for review of the Court of Appeals decision on the State v. Imokawa issue regarding the State’s burden of proof on superseding causes if, and only if, this Court accepts review of Smith’s petition for review on the issue of harmless error of the jury instruction on superseding causation. Smith relies on the case of State v. Imokawa, 4 Wn. App. 545, 422 P.3d 502 (2018) in arguing that the Court of Appeals erred in finding the jury instruction error harmless. That case is currently pending review and should be dispositive regarding the legal issue of whether the State bears the burden of proving the absence of superseding causes in a vehicular homicide case. The State asks this Court to accept review of that issue should this Court accept review of Smith’s issue asserting the Court of Appeals erred in finding the error

regarding the superseding jury instruction harmless in this case. The State submits that the jury instructions given adequately conveyed the State's burden of proof on causation.

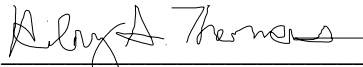
The State also submits that Smith invited the error regarding the instruction because he was the one who proposed the instruction. Under the invited error doctrine, a defendant may not assert on appeal an error regarding a jury instruction if he proposed the jury instruction. State v. Morgan, 123 Wn. App. 810, 818, 99 P.3d 411 (2004), *rev. den.*, 154 Wn.2d 1018 (2005). As he proposed the instruction he complains of, he should not be able to raise this issue for the first time on appeal. The State requests that if this Court accepts review of Smith's issue regarding the jury instructions not being harmless error, that it also grant review on the issue of whether Smith invited the very instructional error he asserts was not harmless.

F. CONCLUSION

For the reasons set forth above, Contingent Cross-Petitioner, State of Washington, respectfully requests that, should this Court grant review of the jury instruction harmless error issue Smith seeks review of, this Court also grant review of the Court of Appeals determination that the jury instructions did not adequately convey the State's burden of proof,

pursuant to State v. Imokawa, and that Smith was permitted to raise the issue for the first time on appeal.

Respectfully submitted this 25th day of March, 2019.



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