No. 97635-0
COA No. 78004-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DYLAN JAMES DOWNEY,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Dylan Downey asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the published Court of Appeals decision in *State v. Dylan James Downey*, __ Wn.App. ___, 2019 WL 3887408 (No. 78004-2-I, August 19, 2019). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The Sixth Amendment guarantees the defendant the right to present a defense which includes instructing the jury on his theory of the case. As part of the right to present a defense, the defendant is entitled to a lesser included instruction where the offense is legally a lesser included and there is an inference the defendant only committed the lesser included offense.

Disregard for the safety of others is a form of aggravated negligence. Negligent driving is a lesser included offense of vehicular assault. The trial court refused to instruct the jury on the lesser included offense of disregard for the safety of others where there was an

inference Mr. Downey only committed that offense. Is a significant question of law under the United States and Washington Constitutions involved entitling Mr. Downey to reversal of his conviction where the court's ruling denied him the right to present his defense?

2. The Sixth Amendment and article I, section 22 require that the defendant receive notice of the offense charged. An amendment to the information to charge another offense midtrial violates this constitutionally protected right to notice and is reversible *per se*. The only exception to this rule is where the amendment is to a lesser degree or lesser included offense.

Mr. Downey was charged with vehicular assault by driving in a reckless manner. The trial court ruled that disregard for the safety of others was an alternative means, not a lesser included offense and *sua sponte* amended the information to add an additional count of disregard for the safety of others. The court instructed the jury consistent with its ruling. Is a significant question of law under the United States and Washington Constitutions involved entitling Mr. Downey to reversal of his conviction where the information was amended to an alternative means in violation of the Sixth Amendment and article I, section 22?

D. STATEMENT OF THE CASE

Dylan Downey and Brittney Wright were good friends who had lived together for a period time in his truck when the two were homeless. 10/24/2017RP 24. Ms. Wright told Mr. Downey she liked motorcycles and talked about acquiring one. 10/24/2017RP 26.

On July 1, 2014, Mr. Downey arrived at Ms. Wright's mother's apartment riding a motorcycle. 10/24/2017RP 26-28. Ms. Wright was excited to see the motorcycle and told Mr. Downey she wanted a ride. 10/24/2017RP 28. Mr. Downey obtained a helmet for Ms. Wright and the two began a leisurely ride. 10/24/2017RP 29. Mr. Downey promised to drive no faster than 25 miles per hour. 10/24/2017RP 30-31.

The owner of the motorcycle, Oliver Leahy, had modified the motorcycle to make it faster. 10/24/2017RP 142. Mr. Leahy also admitted he didn't like to ride with passengers and had modified the motorcycle to a point where it would be very uncomfortable for a passenger to ride on the motorcycle. 10/24/2017RP 143.

While stopped at a stoplight, a police car going in the opposite direction began making a right turn down a side street. 10/24/2017RP 31-32. Mr. Downey quickly drove away from the stoplight.

10/24/2017RP 33. Mr. Downey drove a distance until he came to a curve in the road. 10/24/2017RP 33-36.

The experts who testified at trial differed to a degree on the speed at which Mr. Downey approached the curve. Everett Police Officer Craig Davis calculated the speed at between 49 and 73 miles per hour. 10/24/2017RP 169. Timothy Moebes, a mechanical engineer retained by the defense, calculated the speed at 37 to 66 miles per hour. 10/26/2017RP 278. Mr. Moebes opined it was more likely the motorcycle was going between 45 to 50 miles per hour when it left the road. 10/26/2017RP 265. The speed limit on that section of the road was 35 miles per hour. 10/24/2017RP 158.

The motorcycle failed to negotiate the curve, struck the curb and ejected Mr. Downey and Ms. Wright. 10/24/2017RP 36-37. As Mr. Downey tumbled to a stop, his left leg was severed. 10/24/2017RP 124. Ms. Wright had visible compound fractures of both legs. 10/24/2017RP 124-25.

Mr. Downey was subsequently charged with vehicular assault by alternative means of reckless manner and under the influence of alcohol or drugs, thereby causing substantial bodily harm to Ms.

Wright. CP 27.[1] At trial, Mr. Downey requested the jury be instructed on the lesser included offense of disregard for the safety of others. CP 188-90; 10/24/2017RP 207-08. Following an extensive discussion between the court and the parties, the trial court ruled that disregard for the safety of others was not a lesser included offense, rather it was an alternative means:

> So we have this line of authority which I think makes very clear that vehicular assault and vehicular homicide have both been viewed as these alternative means crimes for which, again, the jury must be unanimous on the issue of guilt but need not be unanimous on the way the crime was committed.
> . . .
> There is clear language in Ferguson suggesting that logically it's a lesser-included offense. But in some sense that runs counter to the notion that these offenses are alternative means offenses. And why this might potentially be important is because the way I have drafted the proposed instructions, it's consistent with the alternative means findings. And the jury would not need to be unanimous as to those alternative means. But I am also including a special interrogatory to have them identify whether or not they are, in fact, unanimous on either one of these prongs, either the recklessness prong or the disregard for safety of others prong.
> . . .
> But I don't believe one can go outside of this other long-established authority which says that these offenses are still alternative means crimes.

[1] The State also charged Mr. Downey with possession of a stolen vehicle. CP 27. The jury acquitted him of this count. CP 152.

10/25/2017RP 238-41. The court instructed the jury consistent with its ruling, instructing that reckless manner and disregard for the safety of others were alternative means. CP 168.

The jury returned a verdict of guilty to vehicular assault, but the special interrogatory submitted to the jury by the trial court indicated the jury was not unanimous as to either of the two alternative means. CP 153-54. In light of this verdict, the court entered a conviction only for the disregard of the safety portion of the verdict and sentenced Mr. Downey accordingly. CP 118, 123.

In a matter of first impression, the Court of Appeals held, without citation to any authority and as a matter of law, that an alternative means of committing a crime cannot also be a lesser included offense. Decision at 5-6. The Court ruled that disregard for the safety of others cannot be a lesser included offense of vehicular assault under the reckless manner prong. *Id.* The Court also found the trial court's amendment of the information after the State had rested by instructing the jury on the uncharged alternative means did not prejudice Mr. Downey. Decision at 7-8.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. The trial court's refusal to instruct on the Defendant's Proposed lesser included instructions requires reversal of Mr. Downey's conviction.

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a defendant's right to a trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"). Similarly, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

A defendant has the right to have the jury accurately instructed as part of his right to present a defense. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Thus, as part of the constitutionally protected right to present a defense, the defendant is entitled to instructions embodying his theory of the case if the evidence supports that theory. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289,

cert. denied, 510 U.S. 944 (1993). "Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

The Court of Appeals ruled an alternative means of committing an offense can never be a lesser included offense. Decision at 5-6. Nothing in this Court's decisions nor in RCW 10.61.006 support this conclusion.

"[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information." RCW 10.61.006. All that this Court requires for the jury to be instructed on a lesser included offense is that: 1) each of the elements of the lesser offense is a necessary element of the offense charged, and (2) the evidence supports an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Disregard for the safety of others plainly meets this test. "Disregard for the safety of others" under RCW 46.61.522(1)(c) refers to aggravated negligence or carelessness or driving rashly or heedlessly

without regard to the consequences. *State v. McNeal,* 98 Wn.App. 585, 593, 991 P.2d 649 (1999). Negligent driving is a lesser-included offense of vehicular assault. *State v. Gostol*, 92 Wn.App. 832, 836, 965 P.2d 1121 (1998).

In *Gostol,* the charged offense was vehicular assault, committed by the alternative means of driving in a reckless manner. 92 Wn.App. at 835. The defendant requested a lesser included instruction of negligent driving, which was denied. *Id.* This Court ruled that negligent driving was legally a lesser included offense, and the defendant had met the factual prong as well. *Id* at 836-38.

This Court should grant review to determine that an alternative means of committing an offense can also be a lesser included offense, and that disregard for the safety of others is a lesser included offense of the reckless manner prong of vehicular assault.

2. The trial court improperly amended the information to add an uncharged count after the State presented its case, violating Mr. Downey's right to notice under article I, section 22.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution require that an accused be informed of the charges he faces at trial. *State v. Kjorsvik,* 117 Wn.2d 93, 97, 812 P.2d 86 (1991); *State v. Pelkey,* 109 Wn.2d 484,

487, 745 P.2d 854 (1987). Alternative means statutes provide multiple ways in which a person may commit a single crime. *State v. Arndt,* 87 Wn.2d 374, 376-77, 553 P.2d 1328 (1976). When the State charges an accused of committing one of several alternative means to a single crime, a trial court errs by instructing the jury that it may consider the uncharged means by which the accused could have committed the crime. *State v. Bray*, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988). Instructing a jury on an uncharged alternative means violates the defendant's right to be informed of the charges against him or her. *State v. Laramie,* 141 Wn.App. 332, 343, 169 P.3d 859 (2007).

In *Pelkey,* the Supreme Court ruled that amending an information to charge a new crime after the State rests violates the defendant's rights under article I, section 22. *Pelkey*, 109 Wn.2d at 487. This is a per se rule that bars amending the information after the State has rested its case. *Pelkey*, 109 Wn.2d at 491.The limited exception to the rule is where "the amendment is to a lesser degree of the same charge or a lesser included offense." *Pelkey,* 109 Wn.2d at 491.

Pelkey articulated a bright-line rule: "A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included

offense." *Pelkey*, 109 Wn.2d at 491. An amendment under the circumstances here is reversible error *per se*, and the defense is not required to show prejudice. *State v. Markle,* 118 Wn.2d 424, 437, 823 P.2d 1101 (1992).

The amendment here occurred well after the State and defense had rested their respective cases, when the court instructed on the alternative means of disregard for the safety of others. CP 168. Under *Pelkey*, this was an error that is reversible *per se*. The fact that Mr. Downey was aware of the disregard issue because he unsuccessfully moved to have the jury instructed on that as a lesser included is of no moment. *See State v. Vangerpen*, 125 Wn.2d 782, 790-91, 888 P.2d 1177 (1995) (State amendment of information to add missing element of offense after resting, where the defendant was aware of the missing element, reversible error *per se* under *Pelkey*).

This Court should accept review, reaffirm its decision in *Pelkey*, and hold that the trial court here improperly amended the information when it *sua sponte* instructed the jury on the uncharged prong of vehicular assault of disregard for the safety of others.

F. CONCLUSION

Mr. Downey asks this Court to grant review, reverse his convictions, and remand for a new trial.

DATED this 6th day of September 2019.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DYLAN JAMES DOWNEY, Appellant.	)	No. 78004-2-I DIVISION ONE PUBLISHED OPINION FILED: August 19, 2019

LEACH, J. — Dylan James Downey appeals his conviction for vehicular assault. He raises two constitutional issues. First, he claims that the court violated his right to present a defense by refusing his request to instruct the jury that one alternative means of committing vehicular assault is a lesser-included offense of committing the same crime by a different means. This claim fails because the lesser-included-offense rule requires a comparison of the elements of two separate crimes and does not apply to different means of committing a single crime.

Second, he claims that the court violated his right to notice of the offense charged when the trial court instructed the jury on an uncharged means of committing vehicular assault after he asked the court to instruct on this means as

a lesser-included offense. Because Downey fails to show a lack of notice or prejudice, we reject this claim too. We affirm.

FACTS

In July 2014, Downey gave his friend, Brittney Wright, a motorcycle ride. Downey was driving over the speed limit[1] when he failed to negotiate a curve and crashed, ejecting him and Wright from the motorcycle. The lower half of one of Downey's legs was severed, and Wright had compound fractures of both legs. The State charged Downey with possession of a stolen vehicle and vehicular assault committed by the alternative means of operating a vehicle in a reckless manner.[2]

At trial, Downey asked the court to instruct the jury on a second means of committing vehicular assault, operating a vehicle with disregard for the safety of others, which he characterized as the "lesser-included offense" of the reckless manner prong. The trial court ruled that disregard for the safety of others prong was not a lesser-included offense of the reckless manner prong but, rather, an alternative means of committing vehicular assault. The court instructed the jury on both alternative means. The jury acquitted Downey of possession of a stolen

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[1] The speed limit was 35 m.p.h.; Downey's expert testified that Downey was most probably driving between 45 and 50 m.p.h.; responding officer Craig Davis testified that Downey's speed was between 49 and 73 m.p.h.; Wright testified that not long before the crash, the speedometer showed 100 m.p.h.

[2] Before trial, the State agreed not to pursue the impairment alternative of vehicular assault that appears in the amended information.

vehicle but found him guilty of vehicular assault. The jury's answers to the special interrogatory verdict form showed that it was not unanimous about the means. The court entered a conviction for the alternative means of disregard for the safety of others. Downey appeals.

ANALYSIS

Downey asserts that the trial court violated his due process rights by not giving the jury his proposed lesser-included-offense instruction and violated his constitutional right to notice when it instead instructed the jury on an uncharged alternative means. We disagree.

First, Downey contends that the trial court erred in not instructing the jury that vehicular assault committed by the alternative means of disregard for the safety of others was a lesser-included offense of vehicular assault committed by the alternative means of reckless manner. A person commits vehicular assault if he causes substantial bodily harm to another while driving a vehicle (1) in a reckless manner, (2) while under the influence of intoxicating liquor or any drugs, or (3) with disregard for the safety of others.[3] The parties agree that vehicular assault is an alternative means statute.[4] This means that vehicular assault is a single crime that can be committed in three different ways.

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[3] RCW 46.61.522(1)(a)-(c).

[4] See State v. Roggenkamp, 153 Wn.2d 614, 626, 106 P.3d 196 (2005).

At issue here are alternative means (1) and (3). "Reckless manner" means "'driving in a rash or heedless manner, indifferent to the consequences.'"[5] "'Disregard for the safety of others'" is "an aggravated kind of negligence, falling short of recklessness, but more serious than ordinary negligence."[6]

The due process clause of the Fourteenth Amendment requires that criminal defendants have a meaningful opportunity to present a defense.[7] "Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case."[8]

Under the two-part test our Supreme Court established in State v. Workman,[9] a defendant is entitled to a lesser-included-offense instruction if (1) each element of the lesser offense is a necessary element of the offense charged (the "legal prong") and (2) the evidence in the case supports an inference that the defendant committed only the lesser crime (the "factual prong"). This court reviews the trial court's determination of the legal prong de novo and the factual prong for an abuse of discretion.[10]

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[5] Roggenkamp, 153 Wn.2d at 618.

[6] State v. Jacobsen, 78 Wn.2d 491, 498, 477 P.2d 1 (1970).

[7] California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

[8] State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

[9] 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997).

[10] State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

But, here, we need not apply the Workman test because Downey does not establish that Workman's lesser-included-offense analysis applies to alternative means of the same offense as opposed to separate offenses. The test requires a comparison of the elements of two separate crimes. This case involves only one crime. And Workman does not involve a comparison of the penalties for different crimes.

In State v. Huyen Bich Nguyen,[11] our Supreme Court examined RCW 10.61.006, the "[i]ncluded offenses" statute. RCW 10.61.006 states, "[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information." In holding that physical control while under the influence of alcohol or drugs is an included offense of driving while under the influence of alcohol or drugs, the court stated, "[T]here is no requirement that an included offense must have a lesser penalty than the charged offense."[12] Both the included offenses statute and our Supreme Court thus define a "lesser-included offense" as an offense separate from the charged offense. Neither the statute nor the Workman test looks at penalties.

Downey cites no authority holding that an alternative means of committing the same crime as the charged offense may qualify as a lesser-included offense

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[11] 165 Wn.2d 428, 437-38, 197 P.3d 673 (2008).
[12] Huyen Bich Nguyen, 165 Wn.2d at 438-39 (emphasis added).

of the charged offense. He offers no persuasive explanation for how a single crime could be a lesser-included crime of itself. Nor does he offer any policy reason for this result.

We hold that because vehicular assault committed by the alternative means of reckless manner and by the alternative means of disregard for the safety of others are alternative means of committing the same crime, not separate crimes, disregard for the safety of others is not a lesser-included offense of reckless manner.

Even if disregard for the safety of others were a lesser-included offense of reckless manner, the trial court did, in fact, instruct the jury on disregard for the safety of others as an alternative means. Downey cites no case requiring a court to affirmatively instruct a jury that an alternative crime it can consider is called "a lesser-included offense." And the special verdict form answers preclude any jury unanimity argument. So he shows no harm.

The special verdict form shows that at least one juror found that Downey committed that offense by driving a vehicle in a reckless manner and causing substantial bodily harm. The jurors not agreeing with this finding found that Downey committed the offense by driving a vehicle with disregard for the safety of others and causing substantial bodily harm. Since a finding of driving in a reckless manner includes a finding of driving a vehicle with disregard for the

safety of others,[13] all jurors agreed that Downey at least had operated a vehicle with disregard for the safety of others and caused substantial bodily injury. One or more jurors decided that he had committed that crime but also did so recklessly.

Second, Downey claims that because the trial court instructed the jury that disregard for the safety of others, a means the State never charged, was an alternative means of vehicular assault, he did not receive his constitutionally mandated notice. The Sixth Amendment to the United States Constitution[14] and article I, section 22 of the Washington Constitution[15] require that all charges be included in a charging document to afford the defendant notice.[16] Downey relies on our Supreme Court's ruling in State v. Pelkey,[17] adopting a per se rule that "[a] criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense."

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[13] State v. Ferguson, 76 Wn. App. 560, 569, 886 P.2d 1164 (1995).

[14] "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." U.S. CONST. amend. VI.

[15] "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him." WASH. CONST. art. I, § 22.

[16] State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

[17] 109 Wn.2d 484, 491, 745 P.2d 854 (1987); see State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993) ("[I]n Pelkey, this court adopted a per se rule limiting the ability to amend an information once the State has rested its case" unless an exception applies.).

Regardless of whether disregard for the safety of others is a lesser-included offense of reckless manner, Pelkey does not apply. Here, the trial court entered a conviction for vehicular assault committed by the alternative means of disregard for the safety of others. RCW 9.94A.515 assigns reckless manner a seriousness level of four and disregard for the safety of others a seriousness level of three. The court thus entered a conviction for the less serious alternative means. Further, Pelkey states that its per se rule does not apply to lesser-included offenses. In addition, the State did not ask to amend the information; the trial court instructed the jury on the alternative means of disregard for the safety of others following Downey's request for a lesser-included instruction on that offense. Downey does not show that he did not receive notice or that any lack of notice prejudiced him.

Statement of Additional Grounds for Review

In Downey's statement of additional grounds for review, he makes three claims based on the fact that the jury was not unanimous as to either of the alternative means of vehicular assault. He claims that the jury implicitly acquitted him of vehicular assault, double jeopardy bars his retrial because of this implied acquittal, and the trial court violated his right to a jury trial. But the case that he relies on examines whether double jeopardy bars the State from retrying a defendant on the greater charge when a jury convicted the defendant of the

lesser charge and was silent as to the greater charge.[18] Here, the trial court instructed the jury on alternative means, not greater and lesser offenses. And our Supreme Court has held that "when there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required."[19] Although Downey states, "[I]t seems clear that there was insufficient evidence introduced at trial to establish the alternative means of reckless manner and disregard for the safety of others," he does not support this assertion with evidence from the record. We reject Downey's claims.

CONCLUSION

We affirm.

Leach, J.

WE CONCUR:

Schindler, J.

Cox, C.J.

[18] Downey cites State v. Linton, 156 Wn.2d 777, 779, 132 P.3d 127 (2006) (affirming the court of appeals decision that double jeopardy barred the State from retrying Linton for first degree assault after a jury convicted him of second degree assault but was not unanimous as to the first degree assault charge).

[19] State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78004-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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