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NO. 65008-4-I

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

YEVGENIY MIKHAYLOV,

Appellant.

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

The Honorable THOMAS J. WYNNE, Presiding at the Trial Court

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred in declining to give Appellant's proposed jury instruction.

B. ISSUES PRESENTED

1. Did the Trial Court err in refusing to give Appellant's proposed jury instruction where the instruction was a correct statement of the law, was central to Appellant's theory of the case, and giving of the instruction was supported by the facts introduced at trial?

C. STATEMENT OF THE CASE

Appellant was charged with Vehicle Assault, See, Report of Proceedings (RP) at 1. Succinctly, the alleged victim was operating a motor vehicle on a surface street, which had one lane of travel in either direction, and was slowing her vehicle to turn left into an intersection/private drive and did turn left and was being passed from behind by Appellant's vehicle, which resulted in the two vehicles colliding. RP at 20; see also, RP at 21, LL 8-9; RP at 21-25; RP at 22, LL 20-23; see also, RP at 42-44.

Appellant requested that the Trial Court include a proposed jury instruction that stated the applicable statutory "Rules of the Road." RCW 46.61., et. seq. RP at 54. In particular, Appellant requested the Trial

Court include the following instruction, based in its entirety upon RCW 46.61.185, which states:

The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard. RCW 46.61.185.

See, RP at 55, LL 19-25; see also, RP 56.

The Court construed this instruction as limited to vehicles coming from the opposite direction. See, RP at 58, LL 2-4. Accordingly, the Trial Court declined to give the proposed instruction. RP at 58, LL 4-5.

Appellant was found guilty. This appeal results.

D. ARGUMENT

1. The Trial Court erred in refusing to give Appellant's jury instructions.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Hughes*, 106 Wn.2d 176, 191 (1986). Failure to give such instructions is prejudicial error. *State v. Reily*, 137 Wn.2d 904 (1999). A Trial Court's refusal to give a proposed instruction is review for abuse of discretion. *State v. Picard*, 90 Wn.App. 890, 902 (1998). A Court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *State ex rel. Carroll v Junker*,

79 Wn.2d 12, 26 (1971). It is reversible error for the trial court to refuse to give a proposed instruction if the instruction states the proper laws and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93 (1995).

The primary rule of statutory construction is to give effect to the legislature's intent. Legislative intent is determined primarily from the statutory language viewed in the context of the overall legislative scheme. Statutory provisions should be read together with others to achieve a harmonious and unified statutory scheme. Statutes relating to the same subject will be read as complementary, rather than in conflict with each other. Courts should avoid construing a statute in a manner which results in unlikely, strange, or absurd consequences. *State v. Creegan*, 123 Wn. App. 718, 726, 99 P.3d 897 (2004). Legislative intent is to be gleaned, if possible, from the language of a statute itself. Legislation is never written on a clean slate, however, nor is it ever read in isolation or applied in a vacuum. *Woodson v. State*, 95 Wn.2d 257,262,623 P.2d 683 (1980). The rule of lenity provides that where an ambiguous statute has two possible interpretations, the statute is to be strictly construed in favor of the defendant. *State v. Lively*, 130 Wn.2d 1,14 (1996).

Appellant's defense at trial is that he was lawfully passing the alleged victim's vehicle as she was simultaneously turning left into an

intersection or private drive. See, RP 56, LL 9-21. In support of this theory, Appellant proposed a jury instruction defining the duties of a driver of a vehicle intending to turn left. RP at 54. The instruction based in its entirety upon RCW 46.61.185. In declining to give this proposed instruction, the Court reasoned that it only applied to vehicles approaching from the opposite direction. RP at 56, LL 7-8; RP 58, LL 4-5.

While the Trial Court's conclusion at first glance appears to be correct, we suggest that the plain meaning of the statute is that any vehicle that poses a hazard to a vehicle turning left is a restriction upon the driver of that vehicle. See, RCW 46.61.185. This construction is supported by the use of the disjunctive "or" in the statute. See, RCW 46.61.185. In particular, the clause "or so close thereto as to constitute an immediate hazard" has to reference vehicles that are lawfully passing from behind, where it otherwise, the Rules of the Road would then be construed to permit a driver to negligently, haphazardly, carelessly, heedlessly, recklessly, turn left into an intersection or a private drive without regard to vehicles approaching from behind. Such a construction, which would invite traffic accidents, cannot be the intent of the legislature. The legislative intent would have to be one to avoid accidents-thus requiring the driver intending to turn left to not only heed vehicles approaching in

the opposite direction *but to* heed vehicles that may be approaching from the same direction.

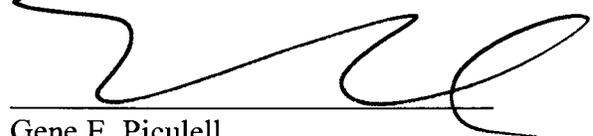
Further, even if there were/are two constructions of this statute, one which the Trial Court ruled upon and the other advanced by counsel at the trial court, the rule of lenity would also apply and the Trial Court should have given the instruction to allow counsel to argue Appellant's theory of the case. It would have still been a correct statement of the law had the instruction been given as proposed by Appellant, the issue then would have been left to the jury for its application.

Therefore, the Trial Court erred in refusing to give Appellant's proposed jury instruction where the instruction was a correct statement of the law, was central to Appellant's theory of the case, and giving of the instruction was supported by the facts introduced at trial.

E. CONCLUSION

For all the above reasons, Appellant respectfully requests this matter be reversed and remanded for failure to give jury instructions.

DATED this 24th day of Aug, 2010



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COUNSEL FOR APPELLANT

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On ~~this~~ day I mailed in U.S. mail a properly stamped envelope addressed to Plaintiff that contained a copy of this document.

I certify under penalty of perjury under the laws of the State of Washington that is true and correct.

Signed at Bellevue, WA, this 24th day of Aug, 20

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