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NO. 66133-7-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

ANTHONY FISHER,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

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ORIGINAL

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I. SUMMARY OF ARGUMENT

Anthony Fisher was tried for vehicular assault in Skagit County Superior Court and found guilty. The Defendant appeals the decision of the Superior Court to deny his request for a lesser included instruction of negligent driving, as well as argues that the Superior Court failed to supply another alternative or lesser included instruction. Mr. Fisher also argues that he should not have been convicted because he was under the influence of a prescribed drug.

II. ISSUES

1. Whether the Superior Court properly denied the Defendant's motion for a lesser included offense of negligent driving in the second degree in a trial for vehicular assault and also whether the Superior Court properly instructed the jury when it did not supply a lesser included instruction when neither party requested it? Yes.
2. Whether the State can prove crime of vehicular assault when the Defendant is found to be under the influence of a prescribed drug? Yes.

III. STATEMENT OF THE CASE

Mr. Fisher was charged with vehicular assault while under the influence of a drug, for hitting Zeedie Collins on September 9, 2009. Anthony Fisher was tried for vehicular assault in Skagit County Superior Court and found guilty. Clerks Papers (CP) page 6. At trial, the State presented evidence that the Defendant was driving a motor vehicle when he crossed over the center line and hit a Ms. Zeedie Collins who was riding her bicycle in the other lane. Report Proceeding (RP) Volume (V) I, pg 158. He had just left the Ferry Dock on Guemes Island where he had a difficult time getting his car off the ferry. RP V1 at 26. At the time of the collision the Defendant had the drug Ambien in his system. RP V1 pg 95. Volunteer firefighters and State Troopers testified at the time of the incident, the Defendant was acting like he was very sleepy and did not know what happened. RP V1 pg 41, 45. He fell asleep most of the 30 – 45 minutes the first aid responders were initially on the scene. RP V1 pg 45 – 46. Ms. Collins suffered a fractured rib among other serious injuries. RP V1 pg 9. After closing arguments the State proposed that the Court instruct the Jury with the instructions for vehicular assault. CP at 6. The Defendant requested a lesser included

instruction of negligent driving. CP at 6. The Court denied the Defendant's request and the jury returned a guilty verdict on vehicular assault. The Defendant appeals that decision of the Superior Court to deny his request for a lesser included instruction.

IV. ARGUMENT

- 1. The Superior Court properly denied a request for a lesser included instruction for negligent driving in the second degree, as it is both an infraction, and does not fit the same elements test.**

The Defendant argues that the Superior Court erred when it denied a request to supply the jury with a lesser included instruction for negligent driving in the second degree. In support of his argument the Defendant supplies the entire statute of RCW 46.61.525, except for subsection (c). Subsection (c) provides that negligent driving in the second degree is an infraction. For many reasons, providing instructions of an infraction in a criminal trial would be inappropriate. Most importantly, the State has to prove an infraction by a "preponderance of the evidence", and is not appropriately before a jury. IRLJ 3.3(a) and (d). A criminal charge is not a civil matter, and is tried normally before a jury, where the State must proof the

elements of the crime beyond a reasonable doubt. CrR 6.1(a) and WPIC 4.01.

Beside the difference between a civil and criminal matter, negligent driving in the first or second degree do not pass the lesser included offense test. Lesser included offenses will generally be permitted "if (1) each of the elements of the lesser offense is a necessary element of the charged offense (the legal test), and (2) the evidence supports an inference that the defendant committed the lesser offense (the factual test). "State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Newbern, 95 Wn.App. 277, 286, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018, 989 P.2d 1142 (1999). A trial court's refusal to give a requested instruction, when based on the facts of the case, "is a matter of discretion that will not be disturbed on review unless there is a clear showing of abuse of discretion." State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). "[T]he failure to give a particular instruction is not error when no request was made for such an instruction; nor are lesser included offense instructions required when

not requested.” *State v. Hoffman*, 116 Wn.2d 51, 111-112, 804 P.2d 577, 609 (1991).

The pertinent case for this issue is *State v. Bosio*, 107 Wn.App. 462, 27 P.3d 636 (2001). In *Bosio*, the defendant argued that the trial court erred by not instructing the jury that negligent driving is a lesser included offense of vehicular assault and cited *State v. Gostol*, 92 Wn.App 832, 935 P.2d 1121 (1998) as the legal authority. *Id.* at 466. The *Bosio* court recounted the changes the legislature made to negligent driving and ultimately found that after 1996 negligent driving was no longer a lesser included offense of vehicular assault. They reasoned that the elements of negligent driving are not necessary elements of vehicular assault; specifically under the reckless prong, there is no requirement that the driver show signs of intoxication; and under the intoxication prong there is no requirement that the driver drove negligently. *Id.* In the present matter the negligent driving elements are not necessary elements of vehicular assault and so the trial court did not err when it refused to provide the jury a lesser included offense of negligent driving, in the first or second degree.

2. **Whether an individual uses illegal or prescribed drugs, the legislature has indicated that if they**

drive under the influence and cause substantial bodily injury to another, they may be found guilty of vehicular assault

The Defendant's second set of arguments seem to be that 1) the Court should have provided lesser included instructions on DUI and negligent driving even though they were not requested by either party and 2) due process requires both DUI and negligent driving to be lesser included offenses of vehicular assault when prescription drugs are involved.

First, the Defendant argues that the Court should have submitted an instruction to the jury that listed DUI as a lesser included offense. However, the Defendant never requested a jury instruction about a lesser included offense of DUI (and even if offered, there was substantial uncontroverted evidence of a substantial bodily injury to the victim). "[T]he failure to give a particular instruction is not error when no request was made for such an instruction; nor are lesser included offense instructions required when not requested." *State v. Hoffman*, 116 Wn.2d 51, 111-112, 804 P.2d 577, 609 (1991). The Court had no obligation to offer lesser included instructions, even if they were appropriately considered lesser included offenses when no one asked for them.

Second, the Defendant cites to *State v. Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995) to suggest that he was denied due process of law because he was not on notice that taking a lawfully prescribed drug could result in a strict liability crime like vehicular assault. Put another way, the Defendant argues that because he was lawfully using a prescribed drug he should not have been found guilty because vehicular assault was only intended for individuals who consume alcohol and illegal drugs. No legal support for that argument exists.

The legislature went out of its way to state specifically that prescription drugs are just the same as illicit drugs or alcohol for purpose of proving that someone is under the influence. Under the elements of vehicular assault, the law reads: "A person is guilty of vehicular assault if he or she operates or drives any vehicle: (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another." RCW 46.61.522. Moving to the definition provided by the legislature under RCW 46.61.502(2), "The fact that a person charged with [DUI] is or has been entitled to use a drug under the laws of this state shall not constitute a defense against a charge of violating this section." Read together, a person commits the crime of vehicular

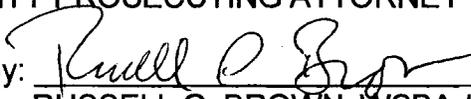
assault when they operate a vehicle while under the influence of "any drug;" the fact that the drug is prescribed "shall not constitute a defense" for the charge of vehicular assault. The Court did not violate Due Process when it did not instruct the Jury on a lesser included offense that was not requested, and Mr. Fisher's conviction was appropriate even though he was found to be under the influence of a prescribed drug.

V. CONCLUSION

For the foregoing reasons, Anthony Daniel Fisher's vehicular assault conviction should be affirmed.

DATED this 9th day of September, 2011.

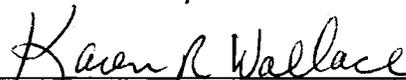
SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Ron Wolff, addressed as PO BOX 558, Conway, WA 98238-0558. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 9th day of September, 2011.


KAREN R. WALLACE, DECLARANT