

No. 34917-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Curtis M. Smith,**

Appellant.

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DIVISION II  
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STATE OF WASHINGTON  
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Grays Harbor Superior Court

Cause No. 06-1-00147-1

The Honorable Judge F. Mark McCauley

**Appellant's Reply Brief**

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## ARGUMENT

### **I. RESPONDENT’S CONCESSIONS REQUIRE REVERSAL.**

Respondent concedes that the trial court erroneously instructed the jury on driving “in a reckless manner,” an essential element of Attempting to Elude. Brief of Respondent, p. 2. Respondent also recognizes the state’s burden to establish harmless error beyond a reasonable doubt. Brief of Respondent, p. 3.

Respondent claims the error is harmless beyond a reasonable doubt, arguing that because driving “with wanton and willful disregard for the safety of others” requires proof of a more culpable mental state than driving in a “rash and heedless” manner. Brief of Respondent, p. 3, *citing State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d. 196 (2005).

Respondent is incorrect for three reasons. First, Respondent mischaracterizes *Roggenkamp*, which does not compare the phrase “wanton and willful” with the phrase “rash and heedless.” Instead, the language Respondent quoted from *Roggenkamp* points out the obvious: that driving “with willful and wanton disregard for the safety of others” involves a higher mental state than driving “with disregard for the safety of others.” *See Roggenkamp* at 626-627. From this, it cannot be assumed that driving “in a rash or heedless manner, indifferent to the

consequences” describes a lower mental state than driving “with willful and wanton disregard for the safety of others.”

Second, regardless of any difference in the mental state involved, the two phrases necessarily describe different *physical* actions as well. Driving “in a rash or heedless manner, indifferent to the consequences” describes both a mental state (“rash or heedless,” and “indifferent”) and a manner of driving (“in a rash or heedless manner”). By contrast, driving “with willful and wanton disregard for the safety of others” describes only a reckless mental state, without comment on the manner of driving. Thus, by equating driving “in a reckless manner” with driving “with willful and wanton disregard for the safety of others,” the court’s instructions lowered the prosecution’s burden of proof by removing the physical *manner* of driving from the jury’s consideration (while applying a different mental standard).

Third, even if (as Respondent claims) the phrase “willful and wanton” describes a higher mental state than “rash and heedless,” the court’s instructions do not explicitly apply the phrase “willful and wanton” to driving “in a reckless manner.” Some jurors may have tried to define driving “in a reckless manner” using Instructions Nos. 7 and 8. Other jurors may have applied Instructions Nos. 7 and 8 to the definition of “reckless driving” (as set forth in the lesser included instructions, Nos. 11

and 12) while working out their own definitions for the phrase “in a reckless manner.”

For all these reasons, the court’s instructions diminished the prosecution’s burden of proof. It is impossible to determine beyond a reasonable doubt that the error was harmless; accordingly, the conviction must be reversed and the case remanded for a new trial. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

**II. THE PERMISSIVE INFERENCE INSTRUCTION WAS UNCONSTITUTIONAL UNDER THE FACTS OF THIS CASE.**

Respondent claims that evidence of speeding was egregious enough to allow the disfavored permissive inference instruction to be used. Brief of Respondent, p. 5. To bolster its argument, Respondent asserts that Mr. Smith was driving “in a residential area with many houses and driveways on each side of the roadway... through an ‘S’ curve and a narrow bridge...” Brief of Respondent, p. 5.

But the problem with Instruction No. 9 is that it focuses the jury solely on the driver’s speed, not on the nature of the neighborhood, the presence of “S” curves, or the narrowness of bridges. It is this singular focus that makes the instruction unconstitutional, except in the most extraordinary of cases. *State v. Randhawa*, 133 Wn.2d 67, 941 P.2d 661

(1997); *Schwendeman v. Wallenstein*, 971 F.2d 313 at 316 (9th Cir. 1992);  
*Hanna v. Riveland*, 87 F.3d 1034 (9th Cir. 1996).

By focusing the jury on the evidence of speed alone, the challenged instruction erroneously permitted the jury to find an element of the crime of which Schwendeman was convicted without considering all the evidence presented at trial. *Schwendeman v. Wallenstein*, at 316.

The other factors noted by Respondent-- the “residential neighborhood with many houses and driveways,” the “ ‘S’ curve and a narrow bridge that the deputy felt was safe at 10-15 mph” -- were irrelevant under Instruction No. 9. It was error for the court to give the permissive inference instruction. *Randhawa, supra*. The conviction must be reversed and the case remanded for a new trial.

**III. IF THE INSTRUCTIONAL ISSUES ARE NOT PRESERVED, MR. SMITH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Smith stands on the arguments made in the Opening Brief.

**IV. THE SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR RESENTENCING.**

Respondent erroneously describes the prosecutor’s Statement of Criminal History as a “presentence report,” and suggests that Mr. Smith acknowledged criminal history by failing to object. Brief of Respondent, p. 6.

By statute, a presentence report is a document prepared at the court's request by the Department of Corrections. RCW 9.94A.500. No presentence report was requested by the court or filed by DOC in this case. The Statement of Criminal History relied upon by Respondent contains nothing more than allegation. As the Supreme Court made clear in *State v. Ford*:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant. *State v. Ford*, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999).

Respondent's reliance on the prosecuting attorney's bare assertions is misplaced. Although the written statement prepared by the prosecuting attorney is undoubtedly helpful to both parties and to the court, it does not constitute proof under RCW 9.94A or under *Ford, supra*.

Respondent next claims that Mr. Smith "acknowledged the defendant's history." Brief of Respondent, p. 6. This is incorrect. Defense counsel acknowledged that Mr. Smith had criminal history generally, but did not specifically acknowledge any prior convictions.

Respondent asserts that Mr. Smith's sentencing issues are waived on appeal. This is incorrect. Illegal or erroneous sentences may be challenged at any time. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d

867 at 874, 123 P.3d 456 (2005); *State v. Ford*, at 477. Furthermore, a defendant cannot agree to a sentence in excess of that which is statutorily authorized; therefore, vacation and remand is required even when the defendant agrees to a miscalculated offender score. *Cadwawllader, supra*, at 874.

Finally, Respondent argues that Mr. Smith's 1996 DUI was properly included in the offender score because subsequent misdemeanor history prevents washout. Brief of Respondent, p. 7. But the sentencing court did not find any misdemeanor history besides the DUI itself. CP 2-3. Given the court's findings, the DUI should not have been included in Mr. Smith's offender score.

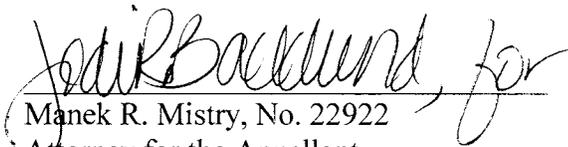
For all these reasons, the sentence must be vacated, and the case remanded for resentencing.

**CONCLUSION**

Mr. Smith's conviction must be reversed and the case remanded for a new trial. If his conviction is not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on February 26, 2007.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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1658 Schmidt Road  
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and to:

Grays Harbor County Prosecuting Attorney  
102 West Broadway Ave., RM 102  
Montesano, WA 98563-3621

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 26, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 26, 2007.

  
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