

NO. 34917-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

CURTIS M. SMITH,
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: 
KATHERINE L. SVOBODA
Deputy Prosecuting Attorney
WSBA #34097

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951



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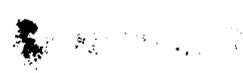


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ISSUES PRESENTED

1. Whether or not any error in the jury instructions was harmless.
2. Whether or not WPIC 95.03 the “permissive inference” instruction was proper.
3. Whether or not the defendant was denied effective assistance of counsel.
4. Whether or not the offender score used at sentencing was proper.

STATEMENT OF THE CASE

Procedural Facts

The State does not disagree with the defendant’s procedural history of this case.

Substantive Facts

On February 24, 2006, Deputy Schrader of the Grays Harbor County Sheriff’s Office was in uniform and on routine patrol on SR 105 in Grays Harbor County when he noticed a car make a right hand turn onto Cranberry Road without signaling. Deputy Schrader then turned down the road and followed the car. (5/2/06 RP at 5-6).

Deputy Schrader noticed that the car was a blue Honda Civic, and that he knew that the car was owned by Dorothy Byers, but had been recently loaned to the defendant, Curtis Smith. Deputy Schrader knew that the defendant had an outstanding DOC warrant for his arrest. As such, Deputy Schrader tried to catch up with the car so that he could see if he could recognize the driver. (5/2/06 RP at 6-7).

As Deputy Schrader attempted to catch up to the car, the car accelerated. At this point, Deputy Schrader turned on the overhead lights and siren of his marked patrol vehicle. The car then continued to accelerate and made a left turn onto Schmid Road. (5/2/06 RP at 8).

Deputy Schrader followed the car, and noted that the car was driving in excess of 70 to 80 miles per hour in a 50 mile per hour zone. The car then made an abrupt right turn and turned into an RV park. When Deputy Schrader caught up to the car, the car was empty and resting up against a small tree. Deputy Schrader heard movement in the brush as he got out of his car. He then called for the suspect to come out. The suspect eventually came out of the brush and was identified as Curtis Smith (5/2/06 RP at 9-16).

ARGUMENT

1. Using the “wanton and willful” instruction was harmless error.

The State concedes to the defendant’s argument that under *State v. Roggenkamp* “in a reckless manner” should be defined as “driving in a rash and heedless manner, indifferent to the consequences.” However, the State asserts that the fact that “wanton and willful” is a higher mental state to prove than “rash and heedless” makes this instruction harmless error.

In *Roggenkamp* the Court found that if the “in a reckless manner”

alternatives of vehicular homicide and vehicular assault were defined as driving “with willful or wanton disregard for the safety of others” then “[t]he ‘in a reckless manner’ alternative would be effectively written out of the statute as prosecutors, seeking to avoid having to prove the **higher mental state**, stopped charging defendants under the ‘in a reckless manner’ alternative.” *State v. Roggenkamp*, 253 Wash.2d 614, 106 P.3d 196 (2005). (emphasis added).

As the Supreme Court has already found “wanton and willful” to be a higher mental state than that required by “rash and heedless” any error in this instruction is harmless beyond a reasonable doubt.

2. Giving WPIC 95.03 Excessive Speed–Inference of Reckless Driving was proper in this case.

Permissive inference instructions are unconstitutional “unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” *County Court of Ulster County v. Allen*, 442 U.S. 140, 166 n. 28, 99 S.Ct. 2213, 2229 n. 28, 60 L.Ed.2d 777 (1979) (quoting *76 *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969)). If the effect of the permissive inference instruction is to relieve the State of its burden to prove each and every element of the crime beyond a reasonable doubt, however, the instruction violates the Due Process Clause. *Ulster County*, 442 U.S. at 156, 99 S.Ct. at 2224.

However, the Court has declined to find permissive instructions

improper in all cases, whether or not the instruction is proper is determined on a case by case basis in light of the evidence produced to the jury in a particular case. *State v. Randhawa* 133 Wash.2d 67, 75-76, 941 P.2d 661 (1997) see *State v. Hanna*, 123 Wash.2d 704, 712, 871 P.2d 135, cert. Denied, 513 U.S. 919, 115 S.Ct. 299, 130 L.Ed. 2d 212 (1994) citing *Ulster*, 442 U.S. at 162-63, 165, 99 S.Ct. at 2227-28, 2228-29 and *Schwendeman v. Wallenstein*, 971 F.2d 313, 316 (9th Cir.1992), cert. denied, 506 U.S. 1052, 113 S.Ct. 975, 122 L.Ed.2d 120 (1993).

In *Hanna*, the use of the permissive instruction was affirmed. The facts showed that the defendant had been “racing” with another car and reached speeds of 80 to 100 m.p.h., and an expert witness put his speed at 103 m.p.h. at the time of the collision. *Hanna*, 123 Wash.2d at 707, 871 P.2d 135.

The instruction was also found proper in a vehicular homicide/assault case where the evidence at trial showed that the defendant’s vehicle spun out of control and collided with an oncoming minivan. Witnesses estimated the defendant’s speed as being as much as twice the speed limit, and the State’s expert witness confirmed that estimate. *State v. Kenyon*, 123 Wash.2d 720, 722, 871 P.2d 144 (1994).

The *Randhawa* court found the permissive instruction improper. However, the facts relating to the defendant’s “speed were not nearly as egregious as those in *Hanna* and *Kenyon*.” At worst, *Randhawa* was

traveling between 10 and 20 miles over the 50 m.p.h. speed limit. The court found “[t]hat speed is not so excessive that one can infer solely from that fact that the driver was driving in a rash or heedless manner, indifferent to the consequences.” *Randhawa* 133 Wash.2d at 78, 941 P.2d 661. However, the court specifically stated “[w]e do not, however, retreat from the view we expressed in *Hanna* and *Kenyon* that there are instances when the fact of speed alone may permit a jury to infer that a driver was recklessly driving.” *Id.*

In the case at bar, the deputy testified that, when he activated his emergency equipment, the defendant was traveling in excess of 50 m.p.h. in a 25 m.p.h. zone, in a residential area with many houses and driveways on each side of the roadway. (5/2/06 RP at 8). The defendant sped up and continued driving at an excessive speed through an “S” curve and a narrow bridge that the deputy felt was safe at 10-15 m.p.h. (5/2/06 RP at 9-10). Through the course of his chase, the deputy estimated the defendant’s top speed at 70-80 m.p.h. (5/2/06 RP at 11).

The defendant’s passenger, Dorothy Byers, also estimated the defendant’s speed at 50-70 m.p.h. (5/2/06 RP at 60-61).

The egregiousness of the driving in this case is comparable to that in *Hanna* and *Kenyon*. Here, according to all the testimony, the defendant was driving at least twice the posted speed limit in a residential area. Based on the facts of the case, the use of WPIC 95.03 was proper.

3. The defendant was not denied effective assistance of counsel.

The defendant's argument that he was denied effective assistance of counsel is moot in this case. Because if the court finds that any error in the jury instructions was harmless beyond a reasonable doubt, there was no denial of effective assistance of counsel. On the other hand, if the court finds that there was error in the jury instructions, the case must be remanded for a new trial.

4. The offender score used at sentencing was proper.

RCW 9.94A.530(2) states that "[i]n determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is...admitted, acknowledged, or proved in a trial or at the time of sentencing...[a]cknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point."

In this case, the defendant did not object to the criminal history presented in the presentence report of the State. In fact, the defense acknowledged the defendant's history. Defense counsel stated "[m]y client, Curtis Smith, has had a long period—long-term involvement with the law in terms of breaking the law...I take note of [the State's] characterization of his history..." (5/22/06 RP at 3-4). As no issue was

raised at sentencing, there is no issue on appeal. *See* RAP 2.5(a); *State v. Moen*, 129 Wash.2d 535, 543, 919 P.2d 69 (1996) (general rule that issues not raised in the trial court may not be raised for the first time on appeal).

Here, using the Statement of Prosecutor, the offender score was correctly calculated at 5. The defendant has four previous felony convictions, counting one point each. (CP at 42). He also has a 1996 conviction for Driving Under the Influence which also counts as one point under RCW 9.94A.525(11). RCW 9.94A.525(1) provides “Serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.” The State presented, and the court acknowledged, the defendant’s “extensive misdemeanor history.” (5/22/06 RP at 5). This history supports the court’s finding of the defendant’s offender score, as the misdemeanors prevent wash-out of the Driving Under the Influence conviction.

Respectfully Submitted,

By: 

KATHERINE L. SVOBODA
Deputy Prosecuting Attorney
WSBA #34097

/kls

COURT OF APPEALS
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DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

No.: 34917-5-II

v.

DECLARATION OF MAILING

CURTIS M. SMITH,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 31ST day of January, 2007, I mailed a copy of the Brief of Respondent and of the Motion to Extend Time to Manek R. Mistry and Jodi R. Backlund, Backlund & Mistry, 203 East Fourth Avenue, Suite 404, Olympia, WA 98501 and to Curtis M. Smith, 1658 Schmidt Rd., Grayland, WA 98547, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman