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No. 49995-9-II

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

STATE OF WASHINGTON

Respondent

vs.

DEAN IMOKAWA

Appellant

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Scott Collier
Superior Court No. 15-1-01561-3

APPELLANT'S REPLY BRIEF

MARK W. MUENSTER, WSBA #11228
1010 Esther Street
Vancouver, WA 98660
(360) 694-5085

STEVEN W. THAYER, WSBA #7449
112 W. 11TH Street
Vancouver, WA 98660
(360) 694-8290

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I. ISSUES RAISED BY RESPONDENT’S BRIEF

1. Did the instructions given in the present case unambiguously place the burden on the state to disprove superseding cause?
2. Did the state prove disregard for safety on Mr. Imokawa’s part beyond a reasonable doubt based on Mr. Imokawa’s attempt to merge back into the left lane after overtaking Mr. Grier’s Land Rover?

II. ARGUMENT IN REPLY

- A. The instructions in this case deprived Mr. Imokawa of due process of law by not unambiguously assigning to the state the burden to disprove superseding cause.

The state’s argument regarding the instructions in this case boils down to this: if there was *sufficient evidence* for a jury to find probable cause, the state necessarily met its burden to disprove any superseding cause and consequently any error in the instructions did not matter. Resp. Br. At 13. This argument should be rejected.

The state argues that the due process of law issue raised by Mr. Imokawa’s opening brief was already decided in two previous cases, *State v. Roggenkamp*, 115 Wn. App. 927 64 P.3d 92 (2003) and *State v. Morgan*, 123 Wn. App. 810, 99 P.3d 411 (2004). This is incorrect. *Roggenkamp* was a juvenile court prosecution in which no jury instructions were involved, and the issue decided by the court was whether the evidence was sufficient to convict. 64 P.3d 100. There was thus no issue regarding whether the jury instructions had correctly allocated the burden of proof to the state and whether the jury had been properly informed on the law, because there was no

jury. The court's discussion of superseding cause was in the context of the overall sufficiency of the evidence. The court noted that if the state had proven proximate cause, it necessarily had disproven there was a superseding cause. 64 P.3d 103. Since the correctness of jury instructions was not involved in the case, it is not controlling here.

In *State v. Morgan, supra*, there was discussion in the opinion about the adequacy of the jury instructions, but it is not clear from the opinion whether Morgan raised the due process issue presented by this case. The decision does not mention the due process clauses of either constitution, nor mention *State v. McCullum*, 98 Wn. 2d 484, 656 P.2d 1064 (1983) or *State v. Acosta*, 101 Wn. 2d 612, 683 P.2d 1069 (1984). The opinion appears to say that any instructional flaw was harmless error since the jury was instructed that the defendant's conduct was not a proximate cause of death if death was caused by a superseding event.

In *Acosta, supra*, the jury was instructed about the issue of self-defense, but was not instructed on which party had the burden to prove self-defense. The state argued that since the jury was instructed it was a "complete defense" to the assault charge if it found that the defendant was acting in self-defense, the jury instructions were adequate. This argument was rejected by the *Acosta* court:

In addition, from the placement of the self-defense instruction immediately after the instruction listing the elements that must be proved by the State, the jury could have believed by negative inference that the State had no burden with respect to self-defense.

After reviewing cases from other jurisdictions, the court went on to say:

A reasonable juror could have mistakenly believed that the State need not disprove self-defense, and that the defendant bore some burden of proof on this issue. The trial court's failure to inform the jury of the State's burden was therefore error.

101Wn. 2d at 623.

The court then rejected the argument that the instructional error was harmless. 101 Wn. 2d at 624.

In the present case, while the jury was instructed about superseding cause, it was never unambiguously instructed that the state had the burden to disprove the existence of a superseding cause. The jury could consequently have concluded that the defense bore the burden of proof on this issue. This is particularly true because Instructions 10 and 15, which discussed superseding cause, stated that if “the defendant should have reasonably anticipated the intervening cause, that cause does not supersede the defendant’s original act and the defendant’s act is a proximate cause.” A reasonable juror could conclude from this instruction that the defendant bore the burden of proving the existence of a superseding cause in order for the defense to apply. The instructions proposed by the defense (A-4 through A-9, Opening Brief) made it clear that the state bore the burden of proving both proximate cause, and that the conduct of Mr. Grier was not a superseding cause of the collision.

Like the defendant in *Acosta*, Mr. Imokawa does not argue that the jury was not instructed at all on his defense. He argues that the instructions were improper because they did not make it clear to the jury that the state had to disprove, as an element of its case, that there was no superseding cause

involved in the accident. Because the element of superseding cause negates proximate cause, as the state implicitly concedes (Respondent's Brief at 19) due process of law under the Fifth and Fourteenth Amendments, and under Const. Art. I §3, required that the state disprove the element of superseding cause once that issue was raised by the defense. The jury instructions on both counts were fatally flawed because they did not unambiguously place the burden of proof of superseding cause on the prosecution.

B. The evidence was insufficient to prove beyond a reasonable doubt that Mr. Imokawa drove with disregard for safety of other drivers when he attempted to merge into the left lane after passing Mr. Grier's vehicle.

The parties agree that in order to convict on the "disregard for safety" prong of either the vehicular assault or vehicular homicide statute, the state had to prove aggravated negligence that is greater than ordinary negligence but less than recklessness. Appellant's Br. at 26; Resp. Br. at 21.

To support its position that Mr. Imokawa was driving with disregard for safety, the state relies on several pieces of evidence, which neither singly or collectively establish its burden of proof to show aggravated negligence, rather than ordinary negligence.

The state first argues that Mr. Imokawa was driving 15 miles per hour over the posted limit at the time he was attempting to pass Mr. Grier's vehicle. This is not aggravated negligence. A driver is allowed to exceed the speed

limit briefly in order to overtake and pass another car going less than the posted speed limit, which Grier admitted he was doing.¹ RCW 46.61.425.

The state next argues that Mr. Imokawa had been following Mr. Grier's Land Rover too closely for a two and a half mile stretch of road. While following too closely can be a traffic infraction, see RCW 46.61.145², it would at most be evidence of ordinary negligence in the event that Mr. Imokawa had rear-ended Mr. Grier's car. That type of collision did not happen. Even if true, following Mr. Grier too closely as both vehicles went northbound was in no way causative of the collision with the southbound vehicle driven by Ms. Dallum.

The state next argues that Mr. Imokawa pulled into the right lane in order to pass Mr. Grier. A driver is allowed to use the right lane to overtake and pass another vehicle under certain circumstances. RCW 46.61.115.³

¹RCW 46.61.425:

1) No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law: PROVIDED, That a person following a vehicle driving at less than the legal maximum speed and desiring to pass such vehicle may exceed the speed limit, subject to the provisions of RCW 46.61.120 on highways having only one lane of traffic in each direction, at only such a speed and for only such a distance as is necessary to complete the pass with a reasonable margin of safety.

² RCW 46.61.145

Following too closely.

(1) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

³ RCW 46.61.115

When overtaking on the right is permitted.

(1) The driver of a vehicle may overtake and pass upon the right of another vehicle

Again, attempting this pass on the right was clearly *not* a causative factor in the collision between Mr. Imokawa and the car driven by Linda Dallum in the south-bound lanes.

The state next argues that one of the southbound drivers saw a puff of smoke at around the time Mr. Imokawa and Mr. Grier had their collision in their northbound lanes. The state's expert established that heat from tires causes a scuff mark. RP III 530, 573. What Ms. Mera likely saw was this part of the collision between the GMC and the Land Rover when Mr. Imokawa's tires were being pushed sideways by Mr. Grier's Land Rover. Again, this is not evidence of aggravated negligence in the collision with Ms. Dallum's vehicle.

The cause of Mr. Imokawa's collision with Ms. Dallum's car was the earlier collision between Mr. Grier's Land Rover and Mr. Imokawa's GMC truck, which occurred when Mr. Imokawa was trying to merge back into the left lane after passing Mr. Grier in the right lane. Although Grier testified the merge was made without sufficient space to do so, and denied accelerating to make this more difficult, the evidence about the safety of this passing maneuver was mixed. One of the witnesses to that collision, Steve

only under the following conditions:

(a) When the vehicle overtaken is making or about to make a left turn;
(b) *Upon a roadway with unobstructed pavement of sufficient width for two or more lines of vehicles moving lawfully in the direction being traveled by the overtaking vehicle.*

(2) The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. Such movement shall not be made by driving off the roadway.

(Emphasis added)

Wicklander, told the police that he thought there *was* enough room for the GMC to make this lane change if it were done properly. RP II 340. A second witness, John Gain, who was behind both the Land Rover and the GMC, could not say there was *not* enough space for the GMC to merge back into the left lane in front of the Land Rover. RP II 316. Mr. Imokawa, an experienced driver, had signaled his intention to move back into the left lane, checked his left hand mirror and obviously thought there was enough space to do so. At most, the state's evidence showed a miscalculation on his part about whether the passing maneuver could be done with safety. In other words, the evidence showed no more than ordinary negligence.

The state attempts to bootstrap testimony about how Mr. Imokawa drove as far away as 2 ½ miles from the scene of the accident to argue he was driving with aggravated negligence at the time he had his collision with Mr. Grier's vehicle which propelled him into the oncoming lane of traffic and the collision with the Dillum vehicle. As argued above, the factors enumerated by the state are not more than ordinary negligence, and/or were not causative factors in the collision with the Grier Land Rover. Even taken in the light most favorable to the state, no rational jury could have found the element of disregard for safety necessary for a conviction under the facts of this case beyond a reasonable doubt.

The state cites a number of cases that have held that the evidence presented in those cases was sufficient to prove the element of "disregard for safety." All are distinguishable on their facts.

In *State v. Brooks*, 73 Wn. 2d 653, 659, 440 P.2d 199 (1968), the defendant was charged under a former version of the negligent homicide statute. Although he was not convicted under the “under the influence of alcohol” prong, there was significant evidence that he was intoxicated, and at least one of the scene witnesses concluded he was drunk based on their conversation after the collision. The evidence that he was driving with disregard for safety was due to the weather, described in the opinion as heavy rain and bad visibility, his high rate of speed, and that well before the head-on collision on a two lane road, he had been seen driving in the oncoming traffic lane. The collision took place when Brooks went into the oncoming lane while rounding a curve. Thus, unlike Mr. Imokawa, who was propelled into the oncoming lane of a divided highway by Mr. Grier’s Land Rover, Brooks was in the oncoming lane of a two-lane road due to his own volition. In the present case, since the weather was clear and the road was dry, Mr. Imokawa’s speed while trying to overtake Grier’s car was not grossly negligent.

In *State v. Eike*, 72 Wn. 2d 760, 435 P.2d 680 (1967), another case decided under the former negligent homicide statute, the defendant admitted to consuming five bottles of beer and some whiskey. Bad weather also played a role in the collision. Like *Brooks*, the collision took place on a two-lane road when Eike went over the center line into the oncoming lane while rounding a curve. Unlike Mr. Imokawa, who was propelled into the oncoming

lane of the divided highway by Mr. Grier's Land Rover, Eike was in the oncoming lane on a two-lane road due to his own volition.

In *State v. McNeal*, 98 Wn. App. 585, 991 P.2d 649 (1999), affirmed⁴ at 145 Wn. 2d 352, 37 P.3d 2002), the defendant, who had a significant quantity of methamphetamine in his system, was charged with vehicular homicide under both the “under the influence” and “disregard for safety” prongs of the statute. He was also charged with vehicular assault, *only* under the “under the influence” prong of the statute. The jury's verdicts were inconsistent, in that it found him not guilty on the “under the influence” prong on the homicide charge, but convicted him on that basis on the vehicular assault charge. The principal issue on his appeal was the effect of the inconsistent verdicts, which the Court of Appeals acknowledged would have required reversal before the decision in *State v. Ng*, 110 Wn. 2d 32, 750 P.2d 632 (1988).⁵ He did not challenge the sufficiency of the evidence for his vehicular homicide charge. Consequently the court's discussion on that issue

⁴ The issue which the Supreme Court considered was whether McNeal had waived his challenge to the inconsistent verdicts by not objecting at the trial court level. The court ultimately held that he had waived the challenge, but again noted that McNeal did not challenge the sufficiency of the evidence to convict on the vehicular homicide count, only the assault count, which was based on his methamphetamine intoxication, for which the Supreme Court found sufficient evidence.

⁵ “[A] criminal defendant convicted by a jury on one count of a criminal accusation cannot attack that conviction because it is inconsistent with the jury's verdict of acquittal on another count.” *Ng*, 110 Wash.2d at 45, 750 P.2d 632; *see also United States v. Powell*, 469 U.S. 57, 65, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984) (finding a variety of factors such as mistake, compromise or lenity can lead to a jury's inconsistent verdict, none of which require dismissal due to such a verdict). Quoted in *State v. McNeal*, *supra*, at 991 P.2d 553.

is dicta.⁶ The collision in his case took place on his side of the road, but the oncoming driver testified that he had been in her lane and that she was compelled to swerve to the left rather than the right because of a steep ditch on the right. The court's discussion found that the fact that McNeal had driven on the wrong side of the road moments before the collision was sufficient to support the jury's finding of "disregard for safety."

To the extent that this discussion of "disregard for safety" has any precedential value for the present case, the facts are easily distinguishable. Mr. Imokawa was not under the influence of any substance at the time of the collision. Unlike McNeal, who had been driving of his own volition in the oncoming lane of a two lane road, Mr. Imokawa was only propelled into the oncoming lane of the divided highway by Mr. Grier's Land Rover.

The final case offered by the state as comparable is *State v. Escobar*, 30 Wn. App. 131, 633 P.2d 100 (1981). Escobar had been drinking before the collision which led to the death of his friend. He and the friend had been racing. His friend was attempting to pass him when the friend collided head-

⁶ "Furthermore, although McNeal has not challenged the sufficiency of the evidence for his conviction of vehicular homicide, we note that this conviction was also supported by substantial evidence...."

The fact that McNeal was driving on the wrong side of the road, viewed in the light most favorable to the State, is itself sufficient evidence that at the time of the accident, he was acting with "disregard for the safety of others." See *State v. Miller*, 60 Wash.App. 767, 774, 807 P.2d 893 (1991) Thus, both convictions are supported by substantial evidence." 991 P.2d at 654.

on with a oncoming car either on or just after a narrow bridge. The court held that because there was evidence of racing, which by definition is reckless driving (RCW 46. 61.530), there was sufficient evidence to support the conviction under that prong of the statute. The decision does not discuss whether the evidence would have been sufficient if Escobar had been charged and convicted only under the “disregard for safety” prong. *Escobar* thus does not support the state’s argument because the conviction there was based on reckless driving, not disregard for safety.

III. CONCLUSION

Mr. Imokawa’s defense to the charge of vehicular homicide and vehicular assault rested chiefly⁷ on the concept of superseding cause. Because the existence of a superseding cause negates proximate cause, due process of law requires the state to assume the burden to disprove superseding cause when the defense presents evidence of this issue. Under *Acosta*, the jury must be told in an unambiguous way that the state bears the burden of proof on any issue where the existence of the defense negates an element of the state’s case. The instructions given in this case failed to do so, and were thus constitutionally defective.

⁷ As argued above, he also argued at trial that he was not reckless, nor grossly negligent.

To argue, as the state does, that the jury's verdicts necessarily show that the state had disproven the existence of a superseding cause, is to confuse the sufficiency of the evidence with the accuracy of the instructions. In *Acosta*, the jury had been informed that self-defense was a complete defense, but found against Acosta nevertheless. The *Acosta* court held that the failure to clearly delineate the burden of proof was still reversible error. The same is true here. This court should reverse and remand for a new trial with correct jury instructions on the burden of proof and elements of the offense.

The jury rejected the alternative given to it of finding Mr. Imokawa guilty of the reckless driving prong of the vehicular assault/homicide statutes. None of the evidence offered by the state proved that Mr. Imokawa had been driving with the aggravated negligence required for a finding under the "disregard for safety" prong of the statute. None of the cases cited by the state to support its argument that the evidence was sufficient to support a finding of "disregard for safety" are comparable to the facts of Mr. Imokawa's case. The state's argument that the evidence was sufficient, based on these cases and this evidence, should be rejected.

The accident which caused the death of Ms. Dallum's passenger was not the result of Mr. Imokawa "tailgating" Mr. Grier, nor his legal attempt to pass a left lane camper on the right, nor his exceeding the speed limit briefly to do so. The accident was caused by his apparent miscalculation of the space available to make the merge back into the left lane. Simple negligence will not suffice to support a conviction for which aggravated negligence is

required under the law. This court should reverse the convictions on both counts and remand with directions to dismiss the information with prejudice.

Dated this _____ day of _____, 2017

LAW OFFICE OF MARK W. MUENSTER

Mark W. Muenster, WSBA 11228

Steven W. Thayer WSBA 7449

Of Attorneys for Appellant

required under the law. This court should reverse the convictions on both counts and remand with directions to dismiss the information with prejudice.

Dated this 27th day of NOVEMBER, 2017

LAW OFFICE OF MARK W. MUENSTER

Mark W. Muenster

~~Mark W. Muenster, WSBA 11228~~

Steven W. Thayer WSBA 7449

Of Attorneys for Appellant

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