

66309-7

66309-7

NO. 66309-7-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DENNIS BOGER,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR.

The prosecution did not produce sufficient evidence to convict Dennis Boger of reckless driving based on the claim that he drove slowly and spun his car's wheels loudly in a parking lot.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

To convict Boger of reckless driving, the prosecution needed to prove he drove a car with a willful or wanton disregard for the safety of people or property. Boger was accused of doing several "burnouts" in a parking lot, in which he spun the car's tires in a way that made a lot of noise and bothered a resident. No one saw him do these burnouts, but rather, the witnesses saw him driving slowly in the parking lot. There was no testimony that the burnouts endangered other people or cars. Did the State fail to prove that Boger purposefully or with wanton disregard for the safety of others drove in a manner that endangered people or property?

C. STATEMENT OF THE CASE.

At about 9 p.m. on December 28, 2009, two people in an apartment complex in Maple Valley heard a car making loud noises

in the parking lot. 1RP 109-110; 2RP 74.¹ It sounded like the car was spinning its tires, or doing “burnouts.” 1RP 109.

After hearing the sound of spinning rubber three times and having his baby awoken by the noise, Rohn Cole went outside to confront the driver. 1RP 110. 115. He saw Dennis Boger driving a pick-up truck very slowly, going about one or two miles an hour. 1RP 110. When Boger drove over a speed bump, he “bumped” his tires. 1RP 110. Even though Cole had not seen Boger doing the earlier burnouts, he assumed that Boger must be the person who drove in the obnoxious fashion in the parking lot. Id. Boger parked his car and stepped out. 1RP 115. Cole confronted him and Boger tried to walk past him. 1RP 124, 135. Three teenagers or young adults joined the argument. 1RP 126. Someone pushed Boger to the ground and kicked him. 1RP 126; 2RP 76, 79. Leann Langerud, who was visiting a friend at the apartment building, called the police because of the assault. 2RP 77, 79. She had also heard the screeching tires that night and thought they were too

¹ The verbatim report of proceedings from the four days of trial proceedings are contained in two volumes of transcripts, referred to herein as follows:

1RP refers to Oct. 20 & 21, 2010;
2RP refers to Oct. 22 & 23, 2010.

loud. 2RP 74. The teenagers fled and never explained why they argued or fought with Boger. 1RP 126.

Police officer Christian Pedersen arrived and spoke to Boger. 1RP 147. Boger smelled of intoxicants and was uncooperative in answering the officer's questions and the officer arrested him. 1RP 150; 2RP 16-17. Boger denied drinking or driving recklessly through the parking lot. 2RP 95, 113-14. He explained that he has a seizure condition that leaves him confused and disoriented, and he is also blind in one eye. 1RP 98. His doctor confirmed the symptoms Boger suffers from his seizure disorder. 2RP 118-21.

After a jury trial, Boger was convicted of felony driving under the influence and reckless driving. CP 89, 90. He received a standard range sentence for the felony and a consecutive term involving two years of probation as a suspended sentence for the reckless driving. CP 91-94; CP 100-01. He timely appeals. CP 103-04.

D. ARGUMENT.

BECAUSE RECKLESS DRIVING REQUIRES MORE THAN ANNOYING OR LOUD DRIVING, BOGER'S CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE

1. The prosecution bears the burden of proving all elements of an offense beyond a reasonable doubt. The most fundamental concepts of criminal procedure require the State to prove to a jury every essential element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, § 3 of the Washington Constitution² and the 14th Amendment to the federal constitution.³ Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

² Art. I, § 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

³ The Fourteenth Amendment provides in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." The Sixth Amendment expressly guarantees the right to a jury trial and the Fifth Amendment requires the State to establish all elements of guilt beyond a reasonable doubt; together, they guarantee a criminal defendant the right to have the fact-finder determine, beyond a reasonable doubt, every essential element of guilt. United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

2. The prosecution did not prove Boger drove with willful or wanton disregard for the safety of others. The prosecution charged Boger with reckless driving. “A person is guilty of reckless driving when that person drives a vehicle in willful or wanton disregard for the safety of persons or property.” State v. Hunley, _Wn.App. __, __ P.3d __, 2011 WL 1856074, *2 (2011); RCW 46.61.500(1).

Somewhat counterintuitively, reckless driving requires more than driving in a “reckless” fashion. Hunley, 2011 WL 1856074 at *2. Driving in a reckless manner “means ‘driving in a rash or heedless manner, indifferent to the consequences.’” Id. (citing State v. Roggenkamp, 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005)).

But mere recklessness is “a lower mental state” than that which is required to prove the offense of reckless driving. Id. The

heightened mental state necessary to commit reckless driving is the “willful or wanton disregard for the safety of persons or property.” Id.

One factor that may give rise to a prima facie evidence of recklessness is excessive speed. See State v. Amurri, 51 Wn.App. 262, 753 P.2d 540 (1988); RCW 46.61.465. But again, driving in a reckless manner does not prove willful or wanton disregard for the safety of others. In Amurri, a 15-year-old who had been drinking alcohol drove fast on an unpaved road; he passed another car by driving onto a narrow, gravel, shoulder; and then he crashed in a ditch. Id. at 264. This combination of factors was prima facie evidence of driving in willful or wanton disregard for the safety of others. Id. at 267.

Another factor contributing to recklessness is the busy nature of the roadway, where there is a high volume of pedestrian and vehicular traffic present. State v. Baker, 56 Wn.2d 846, 861, 355 P.2d 806 (1960) (sufficient evidence for “driving in a reckless manner” when driving in “very crowded vehicular and traffic conditions,” crossing center line of highway, and hitting officer who was directing traffic). Driving while intoxicated is a factor to

consider, but alone it is insufficient to establish willful or wanton disregard for the safety of others. Id.

Boger was not driving at excessive speed. He was driving slowly. 1RP 110. He drove within a parking lot, not on a street busy with traffic. It was nighttime, on December 28, 2009. 2RP 74. There was no testimony about any other pedestrians walking, or cars driving, through the parking lot.

The noise Boger generated by spinning his tires bothered other residents of the apartment building. 1RP 109; 2RP 73. One resident, Rohn Cole, stepped outside to complain because his baby was awoken by the noise. 1RP 109. Cole saw Boger driving “really slow.” 1RP 110. The driver “pulled up to the speed bump, and he bumped over the speed bump. . . .” 1RP 110. Cole could smell burning rubber in the parking lot. 1RP 119. He saw the car continue driving slowly until the driver parked. Cole saw Boger struggle to fit his large Ford F-150 truck into a narrow parking space and get out. 1RP 110, 115. Cole agreed that the parking spots are “tight” and it is hard for anyone to pull into the spots. 1RP 115. Cole assumed that Boger must have been the person who had been doing burnouts even though he did not see him do it. 1RP 110, 134.

Boger moved to dismiss the reckless driving allegation because there was no evidence he endangered anyone or drove with the intent to do so. 2RP 84-85. The judge denied the motion, reasoning that spinning tires in an area where children lived was sufficient to let the jury decide the case, although he noted that it “[d]oesn’t mean I would find him guilty of reckless driving under the circumstances.” 2RP 89.

Contrary to the court’s rationalization, there was not sufficient evidence to support a jury finding of willful or wanton intent to endanger the safety of others. Although people lived in the apartment complex, no one testified that they saw any person in the area that may have been endangered. Neither of the two eyewitnesses saw any other car driving in the parking lot. No one spoke of any person walking through the parking lot. The parking lot was spread out with plenty of space for a driver to navigate. Exs. 3, 5. While putting a specific person in actual danger of harm may not be not required to show the willful or wanton disregard of the safety of others, there must be at least some basis in evidence that Boger intended to put others at risk or wantonly disregarded the substantial probability he was putting others in danger.

No one explained what a “burnout” was at the trial. In drag racing, racers do a “burnout” before a race for the purpose of increasing their traction.⁴ The spinning of the tire clears dirt and helps the racer’s tires stick to the track. Id. The State did not offer any testimony that the burnout is necessarily dangerous or that it was done in a dangerous manner. Instead, the State offered testimony that it involved a loud noise that bothered people in their apartments.

Taken in the light most favorable to the prosecution, Boger drove slowly through the parking lot and spun his tires in a loud and obnoxious fashion. His actions are insufficient to prove that he met the higher mental state of driving in a willful or wanton disregard for the safety of persons or property, which is an essential element of reckless driving.

Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). The prosecution failed to prove Boger drove with a willful or wanton disregard for the

⁴ Wikipedia, <http://en.wikipedia.org/wiki/Burnout> (“drag racing tires perform better at higher temperatures, and a burnout is the quickest way to raise tire temperature immediately prior to a race. They also clean the tire of any debris and lay down a layer of rubber by the starting line for better traction.”); see also Urban Dictionary, burnout definition, available at:

safety of others. His conviction for reckless driving must be dismissed.

E. CONCLUSION.

For the reasons stated above, Mr. Boger respectfully asks this Court to reverse his conviction for reckless driving as it was not supported by the evidence.

DATED this 30th day of June 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66309-7-I
v.)	
)	
DENNIS BOGER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DENNIS BOGER 345287 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2011.

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