

FILED
SUPREME COURT
STATE OF WASHINGTON
1/16/2020 2:05 PM
BY SUSAN L. CARLSON
CLERK

No. 96847-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BRIAN SMITH, Appellant.

**SUPPLEMENTAL BRIEF OF RESPONDENT/
CROSS-PETITIONER**

**ERIC J. RICHEY,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007 / ADMIN. #91075**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 778-5710**

TABLE OF CONTENTS

A.	SUPPLEMENTAL ISSUE	1
B.	RELEVANT PROCEDURAL FACTS	1
C.	ARGUMENT	3

TABLE OF AUTHORITIES

Washington State Cases

State v. Imokawa,
4 Wn. App.2d 545, 422 P.3d 502 (2018) 1

State v. Imokawa,
194 Wn.2d 391, 450 P.3d 159 (2019)..... 1, 3

A. SUPPLEMENTAL ISSUE

This Court directed the parties to address the applicability of this Court's recent opinion in State v. Imokawa, 194 Wn.2d 391, 450 P.3d 159 (2019), to this case.

B. RELEVANT PROCEDURAL FACTS

At the Court of Appeals Petitioner Smith asserted for the first time that the jury instructions had not adequately instructed the jury regarding the State's burden as to superseding causation based on the Court of Appeals Division II decision in State v. Imokawa, 4 Wn. App.2d 545, 422 P.3d 502 (2018). *See* Appellant's Court of Appeals Supplemental Brief. The State responded that Division I was not bound by Division II's opinion in Imokawa, that Division I should follow its analysis in State v. Roggenkamp, 115 Wn. App. 927, 64 P.3d 92 (2003), *aff'd* 153 Wn.2d 614 (2005), and in State v. Morgan, 123 Wn. App. 810, 99 P.3d 411 (2004), and further that Smith should not be permitted to raise the issue for the first time on appeal because Smith had failed to demonstrate that the alleged error was a manifest one of constitutional magnitude under RAP 2.5 and that Smith had invited the error given the instruction on superseding intervening causation defense had proposed. *See* Respondent's Court of Appeals Supplemental Brief.

Division I Court of Appeals followed the rationale in Division II's Imokawa decision and held that the jury instructions had not adequately conveyed to the jury the State's burden to disprove an intervening superseding cause, but ultimately held the error harmless. *See* Court of Appeals Slip Opinion at 23-28 (attached to Smith's Petition for Review).

In Smith's petition for review he alleged that this Court should accept review in part based on an argument that the Court of Appeals decision presented an issue of constitutional significance and conflicted with Division II's decision in Imokawa. *See*, Smith's Petition for Review at 24-25. As Division I agreed the jury instructions had been constitutionally deficient, Smith's argument primarily relied upon the court's decision that the deficient jury instructions were harmless error. *Id.*

In response to Smith's petition for review, the State filed a contingent cross-petition for review requesting this Court to accept review of Division I's decision that the jury instructions were constitutionally deficient pursuant to Division II's decision in Imokawa should this Court grant Smith's petition as to Division I's decision that the error was harmless. *See*, Respondent's Cross Petition at 6-7. The State noted that Division II's decision in Imokawa was pending review at the time and that this Court's decision in that case should be dispositive as to the legal issue

of whether the jury instructions in this case were adequate to convey the State's burden regarding superseding causation. Id.

C. ARGUMENT

This Court's decision in State v. Imokawa, 194 Wn.2d 391, 450 P.3d 159 (2019), is applicable to this case. The State submits it is dispositive as to the issue of whether the jury instructions given here were sufficient to convey its burden regarding superseding causation. Smith acknowledges this in his current supplemental brief.

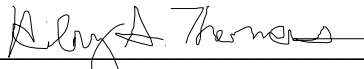
This Court held in Imokawa that WPIC 90.07 and WPIC 90.08 adequately convey the State's burden to prove causation in a vehicular homicide case. It explained that the jury did not need to be instructed that the State has the burden to prove the absence of a superseding intervening cause because "proximate cause and presence of a superseding intervening cause are mutually exclusive. This means proof of proximate cause beyond a reasonable doubt *necessarily* proves absence of a superseding intervening cause." Id. at 165.

The jury instructions in Smith's case were also based on WPIC 90.07 and 90.08 and do not differ in any significant manner¹ from those in Imokawa. CP 96, 97 (Inst. 8, 9), 372, 381. Smith does not assert that they

¹ The instructions in Imokawa included language regarding the conduct of a third person because Imokawa's superseding intervening cause argument was based on the driving of a third person, not the deceased.

do. Therefore, as this Court held in Imokawa, the jury instructions in this case were sufficient to convey to the jury the State's burden of proof regarding superseding causation. Division I's decision to the contrary was erroneous.

Respectfully submitted this 16th day of January, 2020.



HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent

WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION

January 16, 2020 - 2:05 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96847-1
Appellate Court Case Title: State of Washington v. Brian J. Smith
Superior Court Case Number: 14-1-01457-3

The following documents have been uploaded:

- 968471_Briefs_20200116140505SC565545_8653.pdf
This File Contains:
Briefs - Respondents Supplemental
The Original File Name was PFR Supp Brief 011520-signed.pdf

A copy of the uploaded files will be sent to:

- lenell@nussbaumdefense.com

Comments:

Sender Name: Tara Adrian-Stavik - Email: tadrian@co.whatcom.wa.us

Filing on Behalf of: Hilary A. Thomas - Email: hthomas@co.whatcom.wa.us (Alternate Email: appellate_division@co.whatcom.wa.us)

Address:
311 Grand Ave Suite 201
Bellingham, WA, 98225
Phone: (360) 778-5755

Note: The Filing Id is 20200116140505SC565545