

IMP

NO. 66309-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DENNIS JAMES BOGER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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A. ISSUES PRESENTED

A person is guilty of reckless driving when he drives a vehicle with willful or wanton disregard for the safety of persons or property. In this case, Dennis Boger performed multiple “burnouts” by spinning the tires of his Ford F-150 truck in the parking lot of an apartment complex at approximately 8:30 p.m., leaving burned rubber patches on the pavement and drawing the attention of several people with the screeching noise. He did a burnout over a speed bump in the presence of a witness, and eventually parked his truck, after jockeying for position three or four times, with one wheel on top of a curbed flower bed. He was noticeably intoxicated to all he came into contact, and admitted to the arresting officer that he had been drinking two to three gallons of wine a day for the previous three days. Is this evidence sufficient to support his conviction for reckless driving?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Dennis Boger was charged by amended information with the crimes of Felony Driving Under the Influence, Driving While License Suspended in the First Degree, and

Reckless Driving under King County Superior Court Cause Number 10-1-00695-4 SEA. CP 30-31. A jury trial was held before the Honorable Michael Hayden between October 20-24, 2010. 1RP – 2RP. Judge Hayden dismissed the DWLS 1° mid-trial. 2RP 70.¹ Following trial, the defendant was found guilty of both remaining counts as charged. CP 89, 90. He received a standard range sentence for the felony driving under the influence conviction and a 12-month suspended sentence for the reckless driving conviction, consecutive to the felony, with two years of probation. CP 91-94; CP 100-01. He timely appeals. CP 103-04.

2. SUBSTANTIVE FACTS

On December 28, 2009, at approximately 8:30 p.m., Rohn Cole was at home in the Maple Crossing Apartments, putting his kids to bed. 1RP 108-09. His six-month old infant was awoken three times to the distinctive sound of squealing tires in the parking lot just outside of Cole's window. 1RP 109. According to Cole, he heard three or four "burnouts" occur over the course of ten or fifteen

¹ The Respondent adopts the same numbering system of the Verbatim Report of Proceedings, contained in two volumes of transcripts, as the Appellant, referred to herein as follows: 1RP refers to Oct. 20 & 21, 2010; 2RP refers to Oct. 23 & 24, 2010.

minutes, each lasting twenty to forty-five seconds. Id. After the third time, Cole finally called security to report someone driving erratically in the parking lot, and then he went outside to investigate himself. 1RP 110, 134. From his left, Cole saw Dennis Boger, whom he recognized from a previous neighborly contact, driving his Ford F-150 pick-up truck. 1RP 123-24. As Boger pulled up to the speed bump, he “bumped out” the vehicle doing another burnout, and then drove past Cole slowly without ever making eye contact. 1RP 110, 133. Cole could smell burned rubber and see fresh burned rubber patches in the parking lot. 1RP 114, 119.

Cole approached Boger after he parked the truck and confronted him about his behavior. 1RP 111, 124. It was obvious to Cole that Boger was “highly intoxicated.” 1RP 130. He described his impressions as follows: “From the time the car door opened and he fell down on his face I just smelled alcohol. And I mean the whole time. And he just – slurring his words, and fumbling on himself when he was talking and yelling at me, and he was not peaceful by any means. He was, you know, really in my face, and like wanting an altercation, and wanting to push me to do something it felt like.” 1RP 124-25.

During this interaction, three kids approached Boger from behind and, according to Cole, “butted into our argument.”

1RP 126. One of the kids threw Boger to the ground. Id.

LeAnn Langerud was visiting a friend at Maple Crossing Apartments that same evening. 2RP 72. She heard “somebody roasting their tires in the parking lot,” with the tires making a “loud, high-pitched scream.” 2RP 73. She looked outside to see what was going on and saw the Ford F-150 truck driving up and down the parking lot; she later saw Boger get out of the driver’s seat of that vehicle. 2RP 75, 77-78. Langerud went back inside, but returned when she heard people yelling. 2RP 75. She saw a group of kids beating up Boger, so she called 9-1-1. 2RP 76-77. Deputy Christian Pedersen of the King County Sheriff’s Office soon arrived in response to the 9-1-1 dispatch for erratic driving through the parking lot and a possible physical fight. 1RP 145.

Upon his arrival, Deputy Pedersen first talked with Cole, and then contacted Boger. 1RP 145-46. He eventually arrested Boger for DUI because it was clear to him from a wide variety of indicators, including seeing Boger stumbling or walking deliberately slowly, smelling the strong odor of intoxicants, hearing slurred and mumbled speech, observing watery and bloodshot eyes, and

seeing argumentative behavior, that Boger was under the influence of alcohol and had been driving the truck. 1RP 146-50. Boger was taken to the police station, where he refused the breath test.

1RP 155; 2RP 16. He told Deputy Pedersen in response to the “30 Questions” of the DUI process that he had been drinking two to three gallons of wine a day for the last three days. 2RP 22.

Dr. Liu, Boger’s physician, testified that Boger suffers from a seizure disorder that can cause extreme confusion and is exacerbated by stress, lack of sleep, and alcohol. 2RP 118. Boger testified and denied drinking and denied driving that day. 2RP 109, 111.

C. ARGUMENT

SUFFICIENT EVIDENCE SUPPORTS BOGER’S CONVICTION FOR RECKLESS DRIVING BECAUSE KNOWINGLY DRIVING A VEHICLE IN AN INTOXICATED STATE, IN A MANNER THAT COULD ENDANGER PERSONS OR PROPERTY, INFERS WILLFUL OR WANTON DISREGARD FOR THE SAFETY OF PERSONS OR PROPERTY.

Boger contends that his jury conviction for reckless driving should be reversed on the basis of lack of sufficient evidence to prove the mental state of “willful or wanton disregard for the safety

of persons and property” required for the crime. This argument should be rejected.

1. General Law

Evidence is sufficient to support a criminal conviction if, once viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that can be made from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are deemed equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). It is not the court’s role to sort out conflicting evidence or to judge the credibility of witnesses. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Any person who drives a vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving. RCW 46.61.500(1). The mental state of “willful or wanton disregard” may be inferred from the defendant’s conduct, though

the defendant may rebut that inference. State v. Amurri, 51 Wn. App. 262, 265, 753 P.2d 540 (1988). By its plain language, the statute does not require a showing of disregard for the safety of others or their property. Amurri, 51 Wn. App. at 266-67. That is, the State need not show that any identified person or property was actually put at risk due to the driver's actions.

Alcohol consumption is directly relevant to proving willful or wanton disregard, though driving under the influence of alcohol is not *per se* reckless driving. Amurri, 51 Wn. App. at 265. Speeding is *prima facie* evidence of operating a motor vehicle in a "reckless manner." RCW 46.61.465; see Amurri, 51 Wn. App. at 266. "Reckless manner" has been determined to be a lesser mental state than that required for reckless driving, and is defined as "driving in a rash or heedless manner, indifferent to the consequences." State v. Hunley, ___ Wn. App. ___, 253 P.3d 448, 452 (2011), citing State v. Roggenkamp, 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005). There is no case law precedent or statute of which the State is aware suggesting that the absence of speeding precludes a jury from finding that a defendant acted with willful or wanton disregard for the safety of persons or property.

2. The Combination Of Admitted Alcohol Consumption And Erratic Driving In The Apartment Complex Parking Lot Is Sufficient Evidence To Infer Willful Or Wanton Disregard By Boger.

In State v. Amurri, the 15-year-old driver was observed by a patrol officer to pass another vehicle at a speed exceeding the posted limit on the right shoulder of an unimproved road in adverse weather conditions, and then unsuccessfully attempt a left turn at the next intersection, ending up in a ditch. 51 Wn. App. at 263-64. Post-arrest, Amurri admitted to having been drinking beer since the morning of the previous day (he was arrested around 6:00 p.m.), said he had been partying all night, had only slept three or four hours that day, and felt affected by the alcohol he had consumed. Id. at 264-65. The court held that these facts were sufficient evidence to demonstrate willful or wanton disregard for the safety of persons or property, noting that “Amurri drove knowing he was affected by alcohol, knowing that he had no license to drive and was inexperienced, and knowing that he had had little sleep the previous night.” Id. at 267-68.

Our case is directly on point with Amurri. Like Amurri, Boger drove his truck after having consumed, by his own admission, large quantities of alcohol over the previous several days. 2RP 22. He knew at the time that he suffered from a seizure condition that was exacerbated by alcohol. 2RP 118. Rather than go to an empty field or vacant mall parking lot, he chose to drive his F-150 truck around and around the parking lot of an apartment complex populated by adults and children and other vehicles, during a time of day when people are out and about. 1RP 109. He drove the truck in such an erratic manner as to leave burned rubber patches in the parking lot, to wake sleeping children, and to draw the negative attention of tenants and visitors. 1RP 109, 110, 133; 2RP 73, 75. The patches were laid over the course of ten or fifteen minutes, on three or four different occasions, with tires screaming for twenty to forty-five seconds each. 1RP 109. Fortunately, Boger did not lose control of the vehicle, but his choices as to where and how to drive his vehicle, after apparently drinking copious quantities of alcohol, clearly infer a willful or wanton disregard for the safety of the community of Maple Crossing Apartments.

The facts that Boger was not speeding at the time, and did not drive on a crowded roadway, have no legal significance. Though speeding is *prima facie* evidence for establishing that someone drove in a reckless manner, “reckless manner” is not the mental state of this crime. State v. Baker, 56 Wn.2d 846, 355 P.2d 806 (1960), cited by the appellant, notes the fact of a busy roadway to find that there was sufficient evidence that the State proved the element of driving in a reckless manner for purposes of the crime of negligent homicide, not reckless driving. There are no established factors or test to guide a jury to determine if a driver’s behavior infers that he had willful or wanton disregard for the safety of persons or property. Instead, we must rely on our common sense. In this case, the jury’s conclusion that Boger drove recklessly, given the totality of the circumstances and its assessment of the credibility of the witnesses, was clearly supported by the evidence.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to find that there is sufficient evidence to support the

jury's verdict that Boger is guilty of the crime of reckless driving,
and affirm his conviction.

DATED this 25th day of August, 2011.

Respectfully submitted,

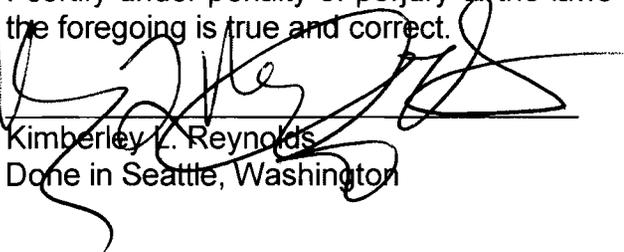
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DENNIS JAMES BOGER, Cause No. 66309-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Kimberley L. Reynolds
Done in Seattle, Washington

8/20/11

Date

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