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No. 71838-0-I

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

STATE OF WASHINGTON,

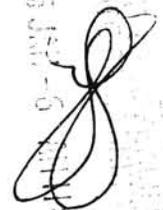
Respondent,

v.

BRIAN SHELLEY,

Appellant.

2015 JUN -6 10:44 AM
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. **The missing essential element of proximate cause cannot be fairly implied. This Court should presume prejudice and reverse.**

“The primary goal of the ‘essential elements’ rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.” State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). “[D]efendants should not have to search for the rules or regulations they are accused of violating.” Id. Thus, all essential elements, including nonstatutory elements, must be contained within the charging document. Id.

The State agrees that the offense of vehicular assault includes the nonstatutory element that the defendant’s driving **proximately** caused substantial bodily harm to another person. Br. of Resp’t at 6. The charging document in this case failed to include this element.

The State appears to concede that the information does not explicitly state the essential element of proximate cause. Br. of Resp’t at 6-7. Rather, the State contends this element can be fairly implied. The State argues that “charging language that links the victim’s injury and the defendant’s driving is sufficient to allege all the essential statutory and nonstatutory elements of vehicular homicide or assault.” Br. of Resp’t at 6. The State cites State v. Tang, 77 Wn. App. 644, 647-48, 893 P.2d 646

(1995) in support of this proposition. Br. of Resp't at 6. This case does not support the State's argument.

Tang involved a challenge to a charging document under the former vehicular homicide statute. Tang, 77 Wn. App. at 646-47. At that time, the State had to prove not simply that the defendant's driving proximately caused death, but that the alcohol consumption, reckless driving, or disregard for the safety of others was a proximate cause. Id. at 646-47. The defendant argued not that the State had failed to allege proximate cause, but that the State had not alleged any causation between the defendant's alcohol impairment and the victim's death.¹ Id. at 647.

This Court rejected the defendant's argument because the information alleged that the defendant drove under the influence and "thereby caused the death" of the victim. This Court also recounted that the information alleged that the victim died "as a proximate result of an

¹ The information in Tang read:

That the defendant THANH DONG TANG in King County, Washington on or about March 9, 1991, while operating a motor vehicle in said county and state, did drive such motor vehicle while under the influence of intoxicating liquors and drugs, and did operate such motor vehicle with disregard for the safety of others, and the defendant thereby caused the death of Kam Chow, who died on March 9, 1991, as a proximate result of an injury proximately caused by such driving and operation....

Tang, 77 Wn. App. at 647 (emphasis added).

injury proximately caused by such driving.” Id. at 647-48. This language adequately advised the defendant of the then necessary causal connection between alcohol impairment and the death of another person. Id.

Tang is not on point. Unlike here, Tang did not involve a challenge to an information that omitted the proximate cause language. Mr. Shelley does not argue that the allegation failed to assert any connection between his driving and injury. Rather, he argues that using the term “cause” is insufficient to fairly apprise him of the requirement that the State prove “proximate cause.” Br. of App. at 10-13. Restated, the word “cause” does not convey the same meaning and import as “proximate cause.” See Kjorsvik, 117 Wn.2d at 108 (a charging document is sufficient if words “conveying the same meaning and import are used.”). This Court should reject the State’s argument that merely alleging a link between a defendant’s driving and injury fairly implies the proximate cause element.

The State’s argument that nothing in the charging language suggested that the harm was or could have been caused by something other than Mr. Shelley’s driving misses the point. Br. of Resp’t at 7. The point is that term “cause” is not synonymous with the term “proximate cause.” The offense requires the State prove that a defendant **proximately**

caused substantial bodily harm through his or her driving, not merely that the defendant was a cause of this harm.

This Court should hold that alleging mere causation is inadequate to fairly imply the nonstatutory requirement that the causation be proximate. Because this essential element cannot be fairly implied from the information, this Court should presume prejudice and reverse. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000).

2. Alternatively, the defendant was prejudiced by the inartful language.

At the very least, the absence of the word “proximate,” used to modify the word “cause,” was inartful. Because Mr. Shelley establishes that he was prejudiced by this inartful language, this Court should reverse even if the first prong of the Krjorsvik test is satisfied.

The Supreme Court has held that municipalities owe a duty to all persons, whether negligent or fault-free, to build and maintain their roadways in a condition that is reasonably safe. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). This holding extends to “legal cause.” Lowman v. Wilbur, 178 Wn.2d 165, 170, 309 P.3d 387 (2013). In Lowman, a passenger was injured after the driver, who was speeding and under the influence of alcohol, lost control and struck a utility pole. Id. at 168. Evidence showed that the utility pole was too close to the road.

Id. The passenger sued the county and energy company. The Court reversed the grant of summary judgment against these defendants, holding that “[w]hatever the reasons for a car’s departure from a roadway, as a matter of policy we reject the notion that a negligently placed utility pole cannot be the legal cause of resulting injury.” Id. at 172.

Accordingly, contrary to the State’s argument, that Mr. Shelley may have been driving too fast to properly navigate the corner does not mean that the jury could not have found the road to be a superseding cause or sole proximate cause. See State v. Meekins, 125 Wn. App. 390, 399, 105 P.3d 420 (2005) (instructions improperly precluded defense argument that the failure by the decedent to have his motorcycle headlight on was sole cause of death). Through the inartful language, Mr. Shelley was misled. Had he been properly informed, he could have argued that the dangerous corner on the road was the sole or superseding cause, not his driving.

The State cites to the probable cause narrative, contending that it actually informed Mr. Shelley of the proximate cause requirement. Br. of Resp’t at 8. But nowhere in that report is the term proximate found. This is unsurprising because neither the report nor the probable cause certification alleged vehicular assault. CP 66-72.

The State further misreads the record in making its argument. Mr. Shelley did not argue that there was a superseding cause for the collision during closing argument. RP 434-40. While Mr. Shelley pointed out he drove in a manner to avoid the bicyclist, he did not argue that the bicyclist was the cause of the accident. RP 437-38. He argued that his actions in giving the bicyclist room showed that his driving was not reckless. RP 437-438. The State fails to show that Mr. Shelley was aware of the proximate cause requirement.

Finally, the State argues that Mr. Shelley was required to ask for a bill of particulars to preserve his challenge to the sufficiency of the charging document. Br. of Resp't at 9. While a vagueness challenge to an information may be waived by not moving for a bill of particulars, a challenge to the sufficiency of the information may be raised at any time. State v. Nonog, 169 Wn.2d 220, 225 n.2, 237 P.3d 250 (2010). Mr. Shelley argues sufficiency, not vagueness. Moreover, the case that the State relies upon, State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989), was decided before the Court adopted the current test in Kjorsvik.

Mr. Shelley establishes prejudice. This Court should reverse.

3. The State failed to properly establish the defendant's offender score, requiring remand for resentencing.

A defendant may affirmatively acknowledge his criminal history and obviate the need for the State to produce evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). This requires affirmative acknowledgement by the defendant of facts and information introduced for the purposes of sentencing. Id. at 928. Because Mr. Shelley did not affirmatively acknowledge any offense that would have interrupted the washout period for the malicious mischief conviction from 2002, this rule does not apply here.

The State argues this rule does apply because Mr. Shelley affirmatively acknowledged his offender score. Br. of Resp't at 12-13. Mr. Shelley's attorney agreed with the State's calculation of Mr. Shelley's offender score. 3/28/14RP 22. The record does not show, however, that Mr. Shelley or his attorney acknowledged any intervening offense that would have interrupted the washout period for the malicious mischief conviction from 2002. Thus, Mr. Shelley's acknowledgement was not sufficient to obviate the need for evidence. This Court should reject the State's argument and remand for a resentencing hearing.

B. CONCLUSION

Due to the defective information, the conviction for vehicular assault should be reversed and dismissed without prejudice. Regardless, this Court should remand for resentencing because the State failed to prove that one of Mr. Shelley's prior offenses had not washed out.

DATED this 5th day of January, 2014.

Respectfully submitted,



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Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	NO. 71838-0-I
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BRIAN SHELLEY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **REPLY 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:

[X] ISLAND COUNTY PROSECUTOR'S OFFICE	(X)	U.S. MAIL
P.O. BOX 5000	()	HAND DELIVERY
COUPEVILLE, WA 98239	()	_____
[X] BRIAN SHELLEY	(X)	U.S. MAIL
838502	()	HAND DELIVERY
MCC-WSR	()	_____
PO BOX 777		
MONROE, WA 98272		

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF JANUARY, 2015.

X _____ 

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