

No. 35061-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Scott Ridgley,**

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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Lewis County Superior Court

Cause No. 06-1-00009-3

The Honorable Judge Richard L Brosey

**Appellant's Opening Brief**

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## ASSIGNMENTS OF ERROR

1. The trial court erred by failing to properly define driving “in a reckless manner.”
2. The trial court erred by instructing the jury on the “wanton or willful” standard for reckless driving.
3. The trial court erred by giving Instruction No. 8, which reads as follows:

Willful means acting intentionally and purposely, and not accidentally or inadvertently.

Wanton means acting intentionally in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, harm the person or property of another.

Instruction No. 8, Supp. CP.

4. The trial court erred by giving Instruction No. 10, which reads as follows:

A person drives recklessly when he drives a vehicle in willful or wanton disregard for the safety of persons or property.

Instruction No. 10, Supp. CP.

5. There was insufficient evidence to establish that Mr. Ridgley was on “active community placement.”
6. The trial court erred by sentencing Mr. Ridgley with an offender score of 11.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Scott Ridgley was charged with Attempting to Elude a Pursuing Police Vehicle, which requires proof that he drove “in a reckless manner.” The trial court did not provide the jury with the correct definition of this phrase, which is “driving in a rash or heedless manner, indifferent to the consequences.” Instead, the court gave instructions relating to reckless driving, which incorporates a “wanton or willful” standard.

Mr. Ridgley's attorney did not object to the incorrect combination of instructions and did not propose the correct instructions.

1. Did the trial court err by failing to correctly define driving "in a reckless manner?" Assignments of Error Nos. 1-4.

2. Did the trial court err by instructing the jury on the "wanton or willful" standard for reckless driving? Assignments of Error Nos. 1-4.

The state alleged that Mr. Ridgley committed the offense while on "active community placement." The trial court instructed the jury to return a special verdict if it found that Mr. Ridgley was on "active community placement" at the time of the offense. The jury was not instructed on the definition of active community placement. Evidence was introduced establishing that Mr. Ridgley was on a DOC "caseload," and that he was on "community custody," no attempt was made to relate these terms to the phrase "active community placement."

3. Did the trial court err by sentencing Mr. Ridgley with an offender score of 11? Assignments of Error Nos. 5 & 6.

4. Did the state produce insufficient evidence to establish that Mr. Ridgley was on "active community placement" at the time of the offense? Assignments of Error Nos. 5 & 6.

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Scott Ridgley was charged by information with Attempting to Elude a Police Officer in Lewis County Superior Court. CP 15-17. At his jury trial, the court gave the following “to convict” instruction:

To convict the defendant of attempting to elude a pursuing police vehicle as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 8<sup>th</sup> day of October, 2005, the defendant drove a motor vehicle;
- (2) That the defendant was given a visual or audible signal to stop by a uniformed police officer by hand, voice, emergency light or siren;
- (3) That the signaling police officer’s vehicle was equipped with lights and siren;
- (4) That the defendant wilfully [sic] failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner;
- (6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other had, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The court did not define for the jury what it meant to drive “in a reckless manner.” Instead, the trial court defined “reckless driving” as follows:

A person drives recklessly when he drives a vehicle in willful or wanton disregard for the safety of persons or property.

Instruction No. 10. Supp. CP.

Willful means acting intentionally and purposely, and not accidentally or inadvertently.

Wanton means acting intentionally in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, harm the person or property of another.

Instruction No. 8. Supp. CP.

The state alleged that Mr. Ridgley was on “active community placement” at the time of the offense. At trial, the prosecutor presented evidence that Mr. Ridgley was on the “caseload” of the Department of Corrections, and that he was on “community custody” at the time of the offense. CP 16; RP (3/20/06) 41-44. The jury was asked to determine whether or not Mr. Ridgley was on “active community placement,” but was not given a definition of that phrase. Supp.CP. By special verdict, the jury found that Mr. Ridgley was on “active community placement” at the time of the offense. Supp. CP.

At sentencing on July 5, 2006, Mr. Ridgley argued that his correct offender score was 10. The Court found that Mr. Ridgley had an offender score of 11 points, and sentenced him to 29 months (the top of the standard range for 9+ points). RP (7/5/06) 19-22. This timely appeal followed. CP 4.

## ARGUMENT

**I. THE TRIAL COURT FAILED TO CORRECTLY DEFINE DRIVING “IN A RECKLESS MANNER,” AN ESSENTIAL ELEMENT OF ATTEMPTING TO ELUDE.**

Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67; 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction that misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Under RCW 46.61.024(1),

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

The phrase “in a reckless manner,” although not defined by the motor vehicle code, is “well settled.” *State v. Roggenkamp*, 153 Wn.2d 614 at 621-622, 106 P.3d. 196 (2005).<sup>1</sup> “ ‘[D]riving in a reckless manner’ means ‘driving in a rash or heedless manner, indifferent to the consequences.’ ” *Roggenkamp*, at 622, quoting *State v. Bowman*, 57 Wn.2d 266 at 270, 271. 356 P.2d 999 (1960).

This differs from the definition of “reckless driving,” which means driving “in willful or wanton disregard for the safety of persons or property...” RCW 46.61.500. Indeed, in 2003, the legislature amended the eluding statute, which had previously included a “wanton or willful” standard. Compare RCW 46.61.024 with former RCW 46.61.024; see Laws of 2003 Chapter 101 Section 1.

In this case, the court did not define the phrase “in a reckless manner” using the standard outlined in *Roggenkamp, supra*. Instead, the court used instructions applicable to the prior version of RCW 46.61.024.<sup>2</sup>

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<sup>1</sup> Although *Roggenkamp* discussed the meaning of the phrase as used in the vehicular homicide and vehicular assault statutes, its reasoning is (for the most part) applicable in this context as well.

<sup>2</sup> Under that statute, which was effective until July 27, 2003, “[a]ny driver of a motor vehicle who wilfully [sic] fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wilful [sic] disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or

Jury Instructions Nos. 8 and 10 outline the requirements for applying the “wanton or willful” standard under the prior statute; they do not define the offense with which Mr. Ridgley was charged. Supp. CP.

The jury may have viewed the “wanton or willful” standard as less onerous than *Roggenkamp*'s “rash/heedless and indifferent” standard. Accordingly, it is impossible for the state to establish that the error was harmless beyond a reasonable doubt, as required by *Brown, supra*. Because of this, the conviction must be reversed and the case remanded for a new trial. At trial, the court should define the phrase “in a reckless manner” as set forth in *Roggenkamp, supra*.

**II. THE STATE FAILED TO PROVE THAT MR. RIDGLEY WAS ON “ACTIVE COMMUNITY PLACEMENT” AT THE TIME OF THE OFFENSE.**

Under the “law of the case” doctrine, surplus language in an instruction may add elements to an offense. Where the state acquiesces to such language, it must present sufficient evidence to prove the additional elements beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97 at 100, 954 P.2d 900 (1998). If the state fails to present sufficient evidence,

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siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.” *Former RCW 46.61.024*.

the conviction must be reversed and the case dismissed with prejudice.

*Hickman, supra.*

Under RCW 9.94A.525(18), “If the present conviction is for an offense committed while the offender was under community placement, add one point.” The Information and the court’s instructions in this case added an element to the offense. Instead of requiring proof that Mr. Ridgley was “under community placement,” the law of the case required proof that he was “on *active* community placement at the time of the commission of this offense.” CP 16; Instruction 15, Supp. CP. *See also* Special Verdict Form A, Supp. CP.

Neither the CCO who testified at trial nor the trial court defined for the jury the phrase “active community placement.”<sup>3</sup> RP (3/20/06) 41-44. Court’s Instructions, Supp. CP. No evidence was introduced establishing that Mr. Ridgley was on “active community placement.” RP (3/20/06) 41-45. Instead, the CCO testified that Mr. Ridgley was on her “caseload,” and that he was on “community custody” at the time of the offense. RP 41-45. No evidence was introduced relating the terms “caseload” or “community custody” to the phrase “active community placement.”

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<sup>3</sup> DOC has failed to define the similar phrase “active supervision.” *See State v. Liden*, 118 Wn. App. 734, 77 P.3d 668 (2003).

Given the absence of any proof and the lack of instruction on these points, the state failed to establish beyond a reasonable doubt that Mr. Ridgley was on “active community placement” on the offense date. Accordingly, one point must be stricken from Mr. Ridgley’s offender score. *Hickman, supra.*

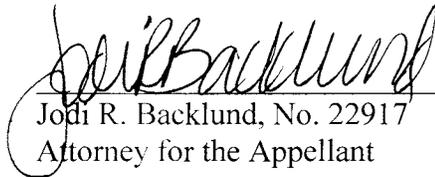
Mr. Ridgley was sentenced to the top of his standard range. CP 10. Although his standard sentencing range will remain 22-29 months, it is possible that the trial judge would have imposed a lower sentence within the range had Mr. Ridgley’s score been less than eleven points. The case must be remanded to the trial court for resentencing with an offender score of ten.

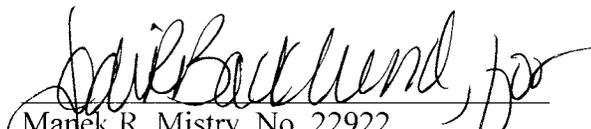
**CONCLUSION**

For the foregoing reasons, Mr. Ridgley's conviction must be reversed and the case remanded for a new trial with proper jury instructions. In the alternative, if the conviction is not reversed, the sentence must be vacated and the case remanded for resentencing with an offender score of ten.

Respectfully submitted on January 16, 2007.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 16, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 16, 2007.

  
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