

No. 35061-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Scott Ridgley,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 JUN 14 AM 9:03
JEREMY

PM 6-1-07

Lewis County Superior Court

Cause No. 06-1-00009-3

The Honorable Judge Richard L Brosey

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT'S ERRONEOUS DEFINITION OF DRIVING "IN A RECKLESS MANNER" WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Respondent concedes that the trial judge instructed the jury using the "reckless driving" standard, but argues that this is the correct definition of driving "in a reckless manner," and suggests that *State v. Roggenkamp*, 153 Wn.2d 614 at 621-622, 106 P.3d 196 (2005) should be limited to cases involving vehicular homicide and vehicular assault. Brief of Respondent, pp. 1-4. Respondent is incorrect.

First, nothing in *Roggenkamp* limits the holding to cases involving vehicular homicide or vehicular assault. Second, the legislature amended RCW 46.61.024 (Attempting to Elude), replacing the phrase "drives his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others" with the phrase "drives his vehicle in a reckless manner." *Compare* RCW 46.61.024 *with former* RCW 46.61.024; *see* Laws of 2003 Chapter 101 Section 1. When the legislature amends a statute, it is presumed to be familiar with the judiciary's decisions. *State v. Bobic*, 140 Wn.2d 250 at 264, 996 P.2d 610 (2000). By amending RCW 46.61.024 to bring it in line with the vehicular homicide and vehicular assault statutes, the legislature adopted the "well established"

meaning of the phrase “in a reckless manner” outlined in *Roggenkamp* and the earlier cases cited therein. *See Roggenkamp* at 622. Respondent’s argument reinserts the “willful and wanton” standard back into the statute, through the definition of reckless driving. This is clearly contrary to legislative intent.

Respondent relies heavily on notes and comments accompanying the Washington Pattern Instructions - Criminal. Brief of Respondent, pp. 2-7. But Respondent’s reliance on the comments and notes is misplaced, because persuasive authority must yield to controlling authority. The plain language of the statute, and the court’s holding in *Roggenkamp* trump the state’s WPIC-based argument. Furthermore, even as persuasive authority, the WPICs are not very convincing: pattern instructions are routinely found to be incorrect. *See, e.g., State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) (pattern instruction on accomplice liability erroneous); *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999) (WPIC 16.02 “clearly erroneous,” *Studd*, at 545); *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (knowledge is an element of Unlawful Possession of a Firearm; standard instruction omitting that instruction erroneous); *State v. Warfield*, 103 Wn. App. 152, 5 P.3d 1280 (2000) (although not before the court, validity of WPIC 39.16 is doubtful).

Respondent has made no effort to argue that the error was harmless beyond a reasonable doubt, as required by *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002). Accordingly, the conviction must be reversed and the case remanded for a new trial.

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

Mr. Ridgley stands on the argument set forth in the opening brief.

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 June 1, 2007.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF MAILING

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

Scott Ridgley, DOC #263697
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Lewis County Prosecuting Attorney
MS: pro01
360 NW North Street
Chehalis, WA 98532-1925

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

All postage prepaid, on June 1, 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 June 1, 2007.



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