

NO. 36881-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID W. THOMPSON,

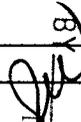
Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUL 10 PM 4:38

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon L. Godfrey, Judge

BRIEF OF APPELLANT

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to instruct the jury on the level of negligence the jury must find to convict appellant of vehicular assault. See CP 52 (Instruction 6).

2. If appellant waived his challenge to the court's failure to properly instruct the jury because he failed to object below or propose an appropriate instruction, then appellant was denied his constitutional right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

Appellant was charged with vehicular homicide and vehicular assault. Both offenses were charged under the "disregard for the safety of others" prong and the "under the influence of any drug" prong. The jury failed to reach a verdict on vehicular homicide, but convicted appellant of vehicular assault, but only under the "disregard for safety of others" prong.

1. The degree of culpability under the "disregard for safety of others" prong for both offenses is less than recklessness, but more than ordinary negligence. The court instructed the jury, "Ordinary negligence in operating a motor vehicle does not render a person guilty of the [sic] Vehicular Homicide." Did the court err in failing to provide a similar instruction with regard to the vehicular assault?

2. If appellant waived his challenge to the court's failure to properly instruct the jury because he failed to object or propose an appropriate instruction below, then was appellant denied his constitutional right to effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

Appellant David W. Thompson was charged with vehicular homicide and vehicular assault. CP 1-2; RCW 46.61.520(1)(a)(c); RCW 46.61.522-(1)(b)(c). CP 1-2. Both charges alleged Thompson was: (1) driving under the influence or affected by drugs; and (2) that he drove with disregard for the safety of others. CP 1-2.

A jury trial was held before the Honorable Gordon L. Godfrey. The jury failed to reach a verdict on the vehicular homicide charge, but did convict Thompson of vehicular assault, but only under the "disregard for the safety of others" prong. A mistrial was declared as to the vehicular homicide charge. 3RP 271-72.¹

The court imposed a standard range sentence of 68 months. CP 63; 3RP 275. Thompson appeals. CP 71-72.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP - August 31, 2007, September 6, 2007 and September 21, 2007; 2RP - September 25, 2007; 3RP - September 26, 2007, September 27, 2007 and October 8, 2007.

2. Substantive Facts

These charges arise from an accident in Grays Harbor County on January 10, 2007. CP 5. The accident occurred at approximately 11:00 a.m. on a straight stretch of Highway 12, with clear visibility for almost three miles. 2RP 23, 31-32; 3RP 169-70. There had been snow prior to the accident, but the road was clear and wet. 2RP 23, 41. There was, however, snow and slush on the shoulder and in areas adjacent to the road. 2RP 31-32, 41; 3RP 168-169.

According to a witness in a passing car, the pickup truck Thompson was driving drifted off Highway 12 onto the paved shoulder, where it struck a bicyclist before continuing down into a ditch, and eventually striking a power pole. 2RP 20-21. Thompson's speed was estimated at between 55 and 60 miles per hour. 2RP 28, 47. The witness opined that, based on the pickup's slow drift off the highway, the driver may have fallen asleep. 2RP 20.

The bicyclist, Charles Jenkins, was thrown from his bicycle and suffered multiple fractures to his ankles and legs. 2RP 21, 48; 3RP 159, 162. Jenkins said he saw the pickup coming straight at him, but that he was incapable of avoiding the collision. 2RP 46-47, 49, 54. Jenkins also said it looked like the driver was struggling over the steering wheel with

a passenger, and that neither of them seemed to be paying attention to the road when they hit him. 2RP 52-53. Jenkins was transported to a local hospital and then to Harborview for surgery and rehabilitation. 2RP 48; 3RP 157-58, 160.

When the pickup struck the power pole, Thompson's passenger, his estranged wife -- Joanne Bollinger, suffered a broken neck and a severed aorta. 3RP 148-51. Both injuries were sufficient to cause rapid death. 3RP 151-52. Bollinger had been wearing her seatbelt improperly, with the shoulder harness passing under her right arm. 3RP 222, 228-29. She died at the scene. 1RP 8-9, 15, 23-24.

Thompson was found in the driver's seat. 2RP 33. He was transported to a local hospital in serious condition with painful injuries. 1RP 24-25. The paramedic who transported him noticed some old IV injection marks on Thompson's arm. 1RP 26-29. While Thompson was being treated at the hospital, the crisis services counselor, who is responsible for establishing the identity of persons brought into emergency, looked in Thompson's pockets for identification. 2RP 83. In addition to Thompson's wallet, the counselor found a syringe and other drug paraphernalia. 2RP 83. At the hospital, Thompson told a doctor he had used methamphetamine earlier that morning. 2RP 83, 86-87.

The initial investigation at the scene indicated the wheels of Thompson's pickup were continuously rolling from the point where it started to leave the highway until it crashed into the power pole. 2RP 34-36. It was estimated Thompson's pickup travelled approximately 283 feet from the time it left the road until it struck the power pole. 3RP 171. Based on the witness's statement, police estimated the pickup hit the bicycle approximately 150 feet before it hit the power pole. 3RP 172-73.

Estimating Thompson's speed at 60 miles per hour, it was calculated he travelled the distance between the roadway and the power pole in 3.5 seconds. 3RP 183-84. Another estimate by police was that Thompson had between two and three seconds from the time he left the roadway until he hit Jenkins's bicycle. 3RP 197. The eyewitness estimated the truck hit the power pole three or four seconds after hitting the bicycle. 2RP 27.

The tracks left in the snow off the road did not suggest any attempt to brake or to steer away from Jenkins or the power pole. 2RP 34-36; 3RP 171-74, 206-07. A picture taken two days after the accident when the road had dried off, however, showed a black mark on the road that may have been proof of an attempt by Thompson to brake. 3RP 223-27.

After investigation by a Drug Recognition Expert (DRE) at the hospital, Thompson was arrested. 2RP 75. He was read his Miranda

warnings and the implied consent advisement. 1RP 46-48. A blood sample was taken, and the analysis showed a methamphetamine concentration of 2.04 milligrams per liter. 1RP 48-49; 2RP 56-58, 75-76, 127-28.

C. ARGUMENT

1. FAILURE TO INSTRUCT THE JURY THAT THE SAME DEGREE OF NEGLIGENCE NECESSARY TO CONVICT THOMPSON OF VEHICULAR HOMICIDE ALSO APPLIED TO THE VEHICULAR ASSAULT DEPRIVED THOMPSON OF A FAIR TRIAL.

Both charges alleged Thompson was driving while "under the influence of or affected by drugs" and that he was driving with "disregard for the safety of others." CP 1-2. Both "to convict" instructions included "under the influence of drugs" and with a "disregard for the safety of others" as alternative elements the jury had to find before it could convict. CP 51-52. The court's jury instructions, however, only instructed the jury on the heightened degree of negligence it must find to convict Thompson of vehicular homicide under the "disregard for the safety of others" prong, thereby erroneously implying a lesser degree of negligence would suffice to convict Thompson of vehicular assault under the same prong. CP 52. The jury found Thompson guilty only of vehicular assault, and only under the "disregard for the safety of others" prong. Because there is a reasonable probability this instructional error is what led to the guilty verdict for

vehicular assault, Thompson was denied his constitutional due process right to a fair trial and this Court should therefore reverse.

As an initial matter, Thompson may raise the trial court 's failure to properly instruction the jury for the first time on appeal. It is true that no exception was taken to Instruction 6, or the failure to give an equivalent instruction regarding vehicular assault. 3RP 234. Instructional error absent an exception below, however, is subject to appellate review when the error is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). An error that has practical and identifiable consequences in the trial is manifest. State v. Ridgley, 141 Wn. App. 771, 779, 174 P.3d 105 (2007).

When a jury instruction relieves the State of its burden to prove every element of the charge, that error is of constitutional magnitude and may be reviewed for the first time on appeal. Ridgley, 141 Wn. App. at 779. When a court instructs the jury with the wrong definitional standard to be applied to the elements of the offense, the defendant's constitutional right to due process is potentially implicated, which could have practical and identifiable consequences for the trial proceeding. Ridgley, 141 Wn. App. at 779. A defendant's due process rights are also violated when the court's instructions fail to provide an ascertainable standard for adjudication. State v. May, 68 Wn. App. 491, 497, 843 P.2d 1102 (1993). Constitution-

al error is presumed prejudicial and will not be found harmless unless the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Ridgley, 141 Wn. App. at 779 (citation omitted).

"Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." Ridgley, 141 Wn. App. at 779 (quoting State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003)). Review of challenged jury instructions is de novo. Ridgley, 141 Wn. App. at 779.

In State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005), the Court addressed consolidated cases challenging the instructions defining "in a reckless manner" given in charges of vehicular homicide and vehicular assault. Roggenkamp, 153 Wn.2d at 618. One of the defendants had failed to take exception to the instruction. The Court, however, found that challenges to that definitional instruction constituted a manifest error affecting a constitutional right and addressed that defendant's challenge. Roggenkamp, 153 Wn.2d at 620 ("Failure to properly instruct the jury on an element of a charged crime is an error of constitutional magnitude which may be raised for the first time on appeal."); see also Ridgley, 141 Wn.

App. at 781-82 (instructional error not waived; instruction was erroneous, but harmless because erroneous instruction applied a higher burden).

This appeal involves the same issue addressed in Roggenkamp and Ridgley in regard to the "disregard for the safety of others" prong. Here, the court provided the jury with Instruction 6, which defined both the "under the influence or affected by the use of drugs" and the "disregard for the safety of others" elements.

A person is under the influence or affected by the use of drugs when that person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of the drug.

Disregard for the safety of others means an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than the ordinary negligence. Operation in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences. Ordinary negligence is the failure to exercise ordinary care. Ordinary negligence is the doing of some act which a reasonably careful person would not do under the same or similar circumstances. Ordinary negligence in operating a motor vehicle does not render a person guilty of the Vehicular Homicide.

CP 52 (emphasis added).

The last sentence of this instruction makes specific reference to the charge of vehicular homicide, but not to vehicular assault charge. Thus, the jury was instructed in a manner that implied the standard of culpability applicable to the vehicular assault was different from that explicitly defined

by the instruction for vehicular homicide. Under Instruction 6, that standard of culpability applicable to vehicular assault remained undefined.

This error was prejudicial. A finding of ordinary negligence is not sufficient to support a conviction for driving with disregard for the safety of others regardless of whether the offense is vehicular homicide or vehicular assault. State v. Eike, 72 Wn.2d 760, 765-66, 435 P.2d 680 (1967) (addressing former negligent homicide statute); see also, 11A Wash. Prac., WPIC 90.05 (definition of "disregard for safety of others" applicable to both vehicular homicide and vehicular assault).

Here, the jury was instructed that the proper standard applied to vehicular homicide. It was not instructed that the same standard applied to vehicular assault. In this circumstance, it would be perfectly reasonable for the jury to believe that the lesser degree of damage resulting from the vehicular assault would permit a finding of guilt on a lesser degree of culpability than required by the instruction for vehicular homicide.

The jury failed to convict on vehicular homicide, to which Instruction 6 explicitly applied. 3RP 268-72. The jury, however, did convict on vehicular assault, to which the higher standard of culpability in Instruction 6 was, at least implicitly, not applicable. CP 58; 3RP 270-71. Given the jury's failure to convict Thompson under the "under the influence

or affected by the use of drugs" prong for either charge, there is a reasonable probability the erroneous implication from Instruction 6, that a lesser degree of negligence was sufficient to convict for vehicular assault, is what led to the guilty verdict for that offense and no verdict for the vehicular homicide charge. 3RP 270-71; CP 58-59.

Because the court's misleading instruction failed to provide the jury with a clear statement of the law on an essential element of the offense for which Thompson was convicted, this Court should reverse.

2. THOMPSON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Should this Court disagree with Roggenkamp and Ridgley and conclude Thompson waived his challenge to the court's failure to properly instruct the jury, then defense counsel's failure to raise an appropriate objection below constitutes ineffective assistance of counsel for which reversal is required.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI;² Wash. Const. art. 1,

² The Sixth Amendment of the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

§ 22.³ When trial counsel makes errors so serious that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and the defendant is prejudiced by that deficient performance, the defendant's right to a fair trial has been violated. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Trial counsel's performance is deficient when "counsel's representation [falls] below an objective standard of reasonableness." Thomas, 109 Wn.2d at 226; Strickland, 466 U.S. at 687-88. A defendant suffers prejudice as a result of counsel's deficient performance when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d 226 (quoting Strickland, 466 U.S. at 694). The defendant is not required to show that "counsel's deficient conduct more likely than not altered the outcome in the case." Thomas, 109 Wn.2d 226 (quoting Strickland, 466 U.S. at 693). The question of whether counsel's performance was ineffective requires case-by-case analysis. State

³ Article 1, § 22 of the Washington Constitution provides in pertinent part: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel[.]"

v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

Where prejudice is shown, failure to except to an instruction which otherwise may be cause for reversal demonstrates a lack of effective assistance of counsel. State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000) (reaching the merits of ineffective assistance, but deciding that the correct instruction was given); State v. Ermert, 94 Wn.2d 839, 849-50, 621 P.2d 121 (1980) (counsel provided ineffective assistance in part by failing to object to instruction that incorrectly set out elements of offense); State v. Howland, 66 Wn. App. 586, 595, 832 P.2d 1339 (1992) (counsel's failure to notice an inaccurate instruction constitutes deficient performance, but without prejudice where defendant convicted of greater charge).

As discussed above, no exception was taken to Instruction 6. 3RP 234. The reference to vehicular homicide without reference to vehicular assault appears to have been a scrivener's error. Reasonably effective counsel, however, should have caught that error and requested that both offenses -- or neither -- be mentioned to make clear that the same standard applies to both offenses. See Ermert, 94 Wn.2d 849-51 (counsel ineffective

for failing to object to instruction that incorrectly stated the elements of the offense). A reasonable judge would have granted that request.

As discussed above, counsel's error was prejudicial in that the instruction permitted the jury to convict based on a lower standard of culpability. As such, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Thomas, 109 Wn.2d 226 (quoting Strickland, 466 U.S. at 694). Had the jury been explicitly told that the higher standard of culpability applied equally to both charges, there is a reasonable probability the jury would have been unable to reach a verdict as to the vehicular assault charge.

This Court should reverse.

D. CONCLUSION

Because the jury was not properly instruction on the degree of negligence it must find to convict Thompson of vehicular assault, this Court should reverse.

DATED this 10TH day of July, 2008.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF JULY 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JULY 2008.

x 