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A. ASSIGNMENT OF ERROR

1. The trial court erred in improperly commenting on the evidence in giving instruction 10.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err and improperly comment on the evidence through Instruction No. 10 when:
 - (a) read as a whole, the set of instructions properly informed the jury of the applicable law; and
 - (b) the jury was allowed to resolve conflicting testimony, evaluate the credibility of witnesses and weigh the persuasiveness of the evidence?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as “RP.” The Clerk’s Papers shall be referred to as “CP.” The Appellant’s Brief shall be referred to as “AB.”

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Savage’s recitation of the procedural history and facts.

3. Summary of Argument

The trial court did not err and improperly comment on the evidence through Instruction No. 10 because: (a) when read as a whole, the instructions properly informed the jury of the applicable law; and (b)

the jury was allowed to resolve conflicting testimony, evaluate the credibility of witnesses and weigh the persuasiveness of the evidence. If error occurred it was harmless, because the untainted evidence is that Savage turned around into oncoming traffic and that the victim's motorcycle was found embedded into the front of his (Savage's) car. Based on this evidence, any reasonable jury would have reached the same result in the absence of the error and convicted. No error occurred, however, and the State respectfully requests the Court to affirm.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR AND IMPROPERLY COMMENT ON THE EVIDENCE THROUGH INSTRUCTION NO. 10 BECAUSE:
 - (a) WHEN READ AS A WHOLE, THE SET OF INSTRUCTIONS PROPERLY INFORMED THE JURY OF THE APPLICABLE LAW; AND
 - (b) THE JURY WAS ALLOWED TO RESOLVE CONFLICTING TESTIMONY, EVALUATE THE CREDIBILITY OF WITNESSES AND WEIGH THE PERSUASIVENESS OF THE EVIDENCE.

The trial court did not err and improperly comment on the evidence through Instruction No. 10 because: (a) when read as a whole, the set of jury instructions properly informed the jury of the applicable law; and (b) the jury was allowed to resolve conflicting testimony, evaluate the credibility of witnesses and weigh the persuasiveness of the evidence.

Jury instructions challenged on appeal are reviewed de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). The effect of a particular phrase in an instruction is examined by considering the instructions as a whole and reading challenged portions in the context of all the instructions given. Pirtle, 127 Wn.2d at 656. Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 908-909, 976 P.2d 624 (1999). Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The jury is presumed to follow the instructions of the court. State v. Grisby, 97 Wash.2d 493, 499, 647 P.2d 6 (1982).

Article IV, § 16 prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case. State v. Becker, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997). In addition, a court cannot instruct the jury that matters of fact have been established as a matter of law. State v. Primrose, 32 Wash.App. 1, 3, 645 P.2d 714 (1982).

In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton,

64 Wash.App. 410, 415-16, 824 P.2d 533 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wash.2d 821, 874, 83 P.3d 970 (2004). Issues of conflicting witness testimony, witness credibility and the persuasiveness of the evidence must be left to the trier of fact. Thomas, 150 Wash.2d at 874-875.

Under the overwhelming untainted evidence test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). A constitutional error is harmless if 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. Guloy, 104 Wash.2d at 425.

Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. Guloy, 104 Wash.2d at 425-426.

The instructions in Savage's case, when read as a whole, contain no error because they properly informed the jurors of the applicable law. Starting with the first sentence of Instruction No. 1, the trial court properly instructed the jury by stating, "[i]t is your duty to determine which facts have been proved in this case from the evidence produced in court." CP

106. On page 1 of Instruction No. 1, the jurors were also specifically informed that “[y]ou should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.” CP 106.

The latter part of Instruction No. 1 provided clear guidance to the jury regarding any potential judicial comment on the evidence:

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.
CP 106.

Through the “to convict” Instruction No. 11, the jury was asked to find, based on the evidence and testimony, whether Savage drove a motor vehicle in a reckless manner or with disregard for the safety of others. CP 106.

When considered as part of an entire set of instructions which are meant to be read together, the first paragraph of Instruction No. 10 asked the jury to consider was whether Savage: (a) in fact turned his car to drive in the opposite direction; (b) it was safe under the circumstances for him to do so; and (c) his action, if he in fact took any, interfered with other traffic. Nothing in this instruction named Savage as the driver of the car,

and/or stated that he in fact had performed any of the actions listed. If Instruction No. 10 had been given to the jury in the following manner, then reversible error would have occurred:

Savage, the driver of a motor vehicle, should not have turned his vehicle so as to proceed in the opposite direction unless such movement could have been made safely and without interfering with other traffic.

This was precisely the problem that the Court addressed in Becker, because the special verdict form identified the Youth Employment Education Program (YEP) as a “school.” Becker, 132 Wash.2d at 63-64. As that instruction read:

[Were] defendant[s], [Donald Becker and Nelson Gannt], within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program School at the time of the commission of the crime? Becker, 132 Wash.2d at 64.

As the Court in Becker correctly reasoned, while a major issue at trial was whether YEP itself was a school, the phrasing of the special verdict form constituted a directed verdict because it specifically identified YEP as such. Becker, 132 Wash.2d at 63. In Savage’s case, nothing like this occurred.

This analysis also applies to the second paragraph of Instruction No. 10, for it too gave the jury the discretion to determine what actually happened: Did Savage turn his car, and if he did, whether he exercised his

primary duty and tried to avoid a collision. Drawing from Savage's brief, the jury could have easily found that he did exercise his primary duty and tried to avoid a collision, as testimony was given that he "looked both ways so see if any cars were coming," and "while attempting to turn around the motorcycle hit the right front end of his car." AB 2. The second paragraph of Instruction No. 10 would have been unacceptable if it had been phrased this way:

The victim was the oncoming driver and therefore the favored driver in this case, and the primary duty to avoid a collision was upon Savage, the driver who turned.

Because it is presumed that juries follow the trial court's instructions, it is clear that the jury, by finding Savage guilty, resolved any conflicting testimony, evaluated the credibility of witnesses and weighed the persuasiveness of the evidence. Based on the extensive, oftentimes conflicting and occasionally technical testimony, the jury could have just as easily have acquitted.

To find that the jury in Savage's case was improperly instructed would be to take Instruction No. 10 both out of context and to read it separately apart from the set as a whole; a practice that the Court in Pirtle cautioned against. Were one to read the instructions in any case individually, an argument could be made more often than not that reversible error occurred.

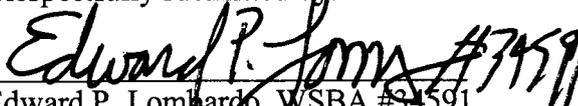
If any error occurred it was harmless beyond a reasonable doubt because the untainted evidence is that Savage turned around into oncoming traffic and that the victim's motorcycle was found embedded into the front of his (Savage's) car. AB 1-2. As Savage correctly states, there was no evidence that the victim was traveling at an excessive speed at the time of impact. AB 3. Based on this evidence, any reasonable jury would have reached the same result in the absence of the error and convicted. Because the jury in Savage's case was properly instructed, however, no error occurred.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 2ND day of APRIL, 2009

Respectfully submitted by:


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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 KEVIN D. SAVAGE,)
)
 Appellant,)
 _____)

No. 38027-7-II

DECLARATION OF
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PROOF OF SERVICE

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DIVISION II
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DEPUTY

I, EDWARD P. LOMBARDO, declare and state as follows:

On THURSDAY, APRIL 2, 2009, I deposited in the U.S. Mail,

postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Thomas Edward Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 2ND day of APRIL, 2009, at Shelton, Washington.


Edward P. Lombardo, WSB# 34591