

No. 42944-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHILA WYATT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Paula Casey, Judge
Cause No. 11-1-00682-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred by admitting the recording of the entirety of a 911 call in which the caller said she was reporting a drunk driver.

2. Whether the trial court erred by excluding evidence that the first investigating officer issued Wyatt a civil infraction for negligent driving in the second degree.

3. Whether sufficient evidence was presented at trial to support the conviction for vehicular assault.

B. STATEMENT OF THE CASE.

The State accepts Wyatt's statement of the substantive and procedural facts, with one exception. The victim suffered a broken femur and required surgery to put a titanium rod and three pins in his leg. RP 62.¹ He testified that his doctor recommended having "it" removed. RP 65. Wyatt interprets that as meaning the doctor recommended removing the leg. Appellant's Opening Brief at 14. In fact, the doctor recommended removing the titanium rod. See CP 111.

Any additional facts relevant to the State's argument will be included in the argument section below.

¹ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the trial transcript, dated November 15 and 16, 2011.

C. ARGUMENT.

1. The court correctly admitted the entirety of the recording of the 911 call, including the statement that the caller was reporting a drunk driver.

The first witness at trial was Kaylee Kinney, a young woman who was driving directly behind Wyatt's vehicle for approximately five and a half miles shortly before Wyatt struck a motorcycle. Kinney was so concerned about Wyatt's driving that she called 911 on her cell phone. RP 34. The recording of that 911 call was played at trial. RP 35-37. A transcript of the call was distributed to the jurors and collected at the end of the recording. RP 35, 38. The dispatcher's first words were, "911, what are you reporting?" Kinney replied, "A drunk driver." RP 35. The dispatcher then pinpointed the location, the description of Wyatt's vehicle, and Kinney described Wyatt's driving. RP 35-36. She said the car was swerving and the speed varied by about 20 miles per hour. RP 36. The dispatcher obtained Kinney's name and phone number. RP 37. Kinney advised that the car had pulled over to let her pass, as well as two other cars, and then pulled back into traffic. The call then ended. RP 37. The word "drunk" was never uttered again during the trial.

Before the witness testified, Wyatt moved to exclude the reference to a drunk driver. The court denied the motion.

I am not going to exclude the 911 tape because of the mention of a drunk driver or require that it be redacted. I think that the reference to a drunk driver when reporting erratic driving behavior is a lay way of saying this is what it appears to me.

You will certainly be able to cross-examine and will be able to establish that there is no evidence that this driver was in fact driving drunk.

Mr. [prosecutor], I will ask that you instruct your witness not to talk about drunk driving in her direct testimony.

RP 11-12.

Just before the recording was played, a sidebar was held during which defense counsel renewed his objection when he learned the transcript would be used. RP 35, 193-94. His objection was overruled.

Wyatt now argues that the single mention of the word “drunk” so prejudiced the jury that it convicted her of vehicular assault without any evidence that she committed the crime.² The record does not support her argument.

It is a stretch to even call Kinney’s statement that she was reporting a drunk driver an opinion. She probably did not expect to have to give a short answer when she called 911, but she was

² The 911 recording was played again during the State’s closing argument. RP 181-84.

putting a label on what she saw. Since she did not see the driver, indeed, did not know whether it was a man or woman, RP 39, and certainly was not in a position to smell alcohol or observe physical symptoms, her statement amounted to, “I am seeing the kind of driving that I associate with a drunk driver.” During her testimony she gave additional detail—the car was swerving, crossed both the center line and the fog line, the speed varied between 10 mph under and 10 mph over the speed limit, and it crossed the center line at least five times, even though there was a rumble strip on the center line that made the whole car vibrate. RP 33-35, 39.

If the statement about the drunk driver was indeed an opinion, it was thoroughly clarified by the witness. ER 701 permits a lay witness to give an opinion under certain circumstances:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of ER 702.

The challenged statement meets all the criteria. Kinney was directly behind Wyatt and clearly observing the driving. It was helpful to the jury because it explained that Wyatt’s driving was so

bad she thought the driver was drunk, and it was not based upon anything but common knowledge and experience.

Wyatt's argument is that the "opinion" was more prejudicial than probative. ER 403 permits even probative evidence to be excluded if the danger of prejudice, confusion of the issues, or misleading the jury substantially outweighs the probative value. The words "drunk driver" helped explain just how much of an impression Wyatt's driving made on Kinney. The danger of prejudice, of which Wyatt makes much, is virtually nonexistent.

Wyatt is correct that she was not charged with being intoxicated, RCW 46.61.522(1)(b), but rather RCW 46.61.522(1)(a). CP 3. The State offered no evidence that she was under the influence of alcohol or drugs. During the remainder of the trial the words "drunk" and "intoxicated" were never used. The jury was instructed that it must decide the case based solely on the evidence presented at trial, CP 68, that it must decide based on the facts rather than emotion, CP 70, that Wyatt was accused of driving recklessly, CP 76, 78, and that recklessness meant driving in a rash or heedless manner. CP 79. The State never argued that she was intoxicated. 178-84.

Yet Wyatt maintains that the jury was so influenced by this one word that it disregarded the evidence, ignored the instructions, and abandoned common sense to convict her of vehicular assault. She insists that the outcome of the trial was materially affected by this one word, Appellant's Opening Brief at 23, but she does not point to anything in the record to support that conclusion. She merely assumes that because the jury found her guilty, it must have been prejudiced. But despite her argument that there was insufficient evidence of reckless driving, which will be addressed below, there was ample evidence for the jury to find, without ever considering the word "drunk," that Wyatt drove recklessly. In her Opening Brief at 25 she provides a list of the things she didn't do. She didn't engage in acts of daring driving or joyriding.³ She didn't pass on a shoulder abutting a ditch. She didn't drive the wrong way on the freeway while intoxicated. If that were a comprehensive list of the ways in which one could drive recklessly, her position would be valid. But she did drive at inconsistent speeds regardless of the speed limit, cross the rumble-strip in the center line at least five times in five and a half miles, cross the fog line multiple times, and

³ Joyriding is a term that means "intentionally taking and driving away the vehicle without the permission of the owner." State v. Komok, 113 Wn.2d 810, 814 n.2, 783 P.2d 1061 (1989). It is unclear how taking a motor vehicle without permission equates to reckless driving.

eventually drive across the center line and the oncoming lane to strike a motorcycle which was on the fog line of its own lane. The jury was more than justified in finding that to be reckless driving. With that kind of evidence before it, it is unlikely that the outcome of the trial would have been different without the challenged opinion, and therefore, even if it was error to allow it, it was harmless.

“Strong policy reasons support the use of harmless error analysis. ‘A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.’ State v. White, 72 Wn.2d 524, 531, 433 P.2d 692 (1967). A reversal should occur only when the reliability of the verdict is called into question.” State v. Neidigh, 78 Wn. App. 71, 78-79, 895 P.2d 423 (1995).

Wyatt argues that the jury was likely to have focused on the words “drunk driver” because there was no evidence presented as to why she was driving erratically. Opening Brief at 25. But the State does not have to prove why a person drives recklessly, only the nature of the driving. Nothing in the jury instructions gave the jury any basis on which to believe it could not reach a decision about recklessness without determining the cause of it. Wyatt cites to an observation the judge made at sentencing that the cause of

the accident was a mystery, Opening Brief at 25-26, but (1) a sentencing judge has different considerations than does the jury, and (2) there are oftentimes things that would be interesting to know, but which are not necessary to the task before the court. In deciding on the sentence to impose, the reasons for Wyatt's driving would be relevant; in deciding guilt, they would not.

The court did not err in admitting a lay witness's statement that she was reporting a drunk driver. It is only barely an opinion. There is nothing in the record to suggest that it was prejudicial.

2. The trial court did not abuse its discretion in excluding evidence that Trooper Orf cited Wyatt for second degree negligent driving.

Wyatt maintains that it was an abuse of discretion for the trial court to exclude evidence that the first State Patrol investigator, Trooper Orf, issued Wyatt a citation for second degree negligent driving, a civil infraction. Opening Brief at 26.

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on

facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that “no reasonable person would take,” and arrives at a decision “outside the range of acceptable choices.” Id.

Wyatt hypothesizes reasons that the trial court ruled to exclude the evidence of the citation, the first being collateral estoppel. Opening Brief at 27. The court said:

Well, I will have to say that I don't like the way this case presents itself, that there was first a citation which was dismissed and later these charges were filed, but that issue has been decided and determined earlier in this case. That is not up to me.

I don't like that an investigation was done and because the victim's father works for the Thurston County Sheriff's Office that pressure or at least request was made to the State Patrol to do additional investigation. But the fact of the matter is that I don't believe any of that is relevant to the prosecutor's decision to actually pursue this case, and I don't believe any of that information is relevant to the jury's decision about whether the defendant has committed this crime.

RP 105.

This remark by the judge is not a statement of the court's belief that the evidence of the earlier citation was inadmissible because of collateral estoppel. It is merely the expression of

displeasure in the way the case was handled, but that it was over and done and the court could not change it. It does not appear that the court was referring to any decision on the merits that was binding on the trial court.

Wyatt is correct that the court found the evidence to be irrelevant. For reasons discussed below, the court was correct. Wyatt further opines that the court adopted the reasoning of the State that the opinion of the Trooper would be improper because, were the situation reversed and the defendant charged with a lesser offense, the officer would not be permitted to testify that he thought she had committed a greater one. RP 102. There is nothing in the ruling quoted above to indicate that the court ruled on this basis. It would not be error if that were the case, but the record does not indicate that it was. Therefore, the basis for the court's ruling was clearly, and simply, that the evidence was not relevant. The court was correct.

Wyatt maintains that when Trooper Orf issued the citation for negligent driving, it was an expression of his opinion that she was driving negligently but not recklessly. She describes his investigation, and concludes that his "considered opinion" was directly relevant. She also argues that as an expert, he should

have been allowed to give his opinion. Opening Brief at 28-29. ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 703 says:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

And finally, ER 704 reads as follows:

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

While there is no question that Trooper Orf qualified as an expert, RP 119-21, the fact remains that his investigation in this case was so woefully inadequate that any conclusion reached was clearly not based on the evidence but an unwillingness to spend the time to reach an informed conclusion. Trooper Orf arrived on the scene after the Sheriff's deputies, the ambulance, and the fire units. RP 93, 115, 120. The victim was in the ambulance, where Orf

made his only contact with him. RP 144. He identified him, found out the nature of his injuries, and asked him what happened. RP 121. There was no testimony as to what the victim told him. The trooper went to the hospital later to speak to Ziesemer, but he was undergoing x-rays, and the trooper did not wait until he was available. RP 69. Orf spoke to at least one deputy, RP 121, 144. Deputy Ryan Hoover said he would have told Orf whatever Wyatt told him. RP 115. He recalled that Wyatt was lethargic, but couldn't recall any other specifics about his contact with her. RP 116. Deputy Cameron Simper told Orf only that the victim was in the ambulance, and that the vehicle on one side of the road hit the motorcycle on the opposite side. RP 93-94. There were several passersby at the scene, but Simper did not talk to them, RP 95, nor is there any indication that Orf did so. Kinney, who made the first call to 911, was apparently never contacted by Orf. She was interviewed by Detective Gunderson a year later. RP 42.

Trooper Orf spoke to Wyatt after she was placed into the ambulance. He asked her why she crossed the center line and she replied that she wasn't familiar with the area. RP 126. She did not mention anything about the motorcycle pulling out in front of her. RP 140. He had no further contact with her. RP 144. Only after

Detective Gunderson began her investigation in November of 2011, RP 156, did Orf learn that there was a claim that the motorcycle had pulled out in front of Wyatt's car. RP 140. Orf testified that the damage to the vehicles was not consistent with that explanation. RP 140-41.

Trooper Orf contacted a witness who "had pulled out on the roadway and observed some driving." RP 146. He does not name the witness, and it is unknown whom that would have been. Kinney and Ziesemer were the only witnesses who saw Wyatt driving and who testified at trial. Kinney did not speak to Orf at all and it obviously was not Ziesemer.

Orf did walk through the scene of the collision, but apparently he did not take measurements, since his testimony is expressed in terms of estimates, *i.e.*, the car had traveled "approximately a hundred feet maybe down that fog line . . ." RP 122. He followed a scrape mark, which was caused by the wheel of Wyatt's car after the tire separated from it, from the debris on the roadway to Wyatt's car. RP 123. He saw damage to the left front corner of her vehicle. Id. He could not describe in any detail the damage to the motorcycle. RP 124. Orf impounded Wyatt's car

and did an inventory search, RP 144-45, but he could not remember for sure what was in the car. RP 145.

Trooper Orf took photographs, which turned out "terrible." RP 127. The photographs were admitted at trial, RP 128, but they were so bad that when looking at Exhibits 7 and 28, for example, he could not tell for sure what direction the camera was pointing. RP 129-30, 139. The scrape marks did not show at all. RP 131-33. Even though Wyatt's car was impounded, Orf apparently did not take better photographs under better conditions.

From this hopelessly incomplete investigation, Orf concluded that Wyatt had crossed the centerline. RP 140. He issued her a citation for second degree negligent driving. Wyatt contested the ticket, in a hearing where there was no testimony but hers and the written statement of Trooper Orf. She told the District Court judge that the motorcycle had pulled out in front of her and the infraction was dismissed. RP 97, 103-05.

The State Patrol later re-opened the investigation. RP 150. Wyatt wanted to argue to the jury that the second investigation was slanted because it was presumably done as a result of complaints by the victim's father, who worked for the Sheriff's Office. RP 98. The prosecutor correctly pointed out that this approach was for the

purpose of putting the State Patrol on trial and diverting attention from Wyatt. RP 100. The court correctly ruled that it was not relevant and thus not admissible. RP 105. The court did not like the manner in which the case was handled, but the bottom line is that Trooper Orf's earlier citation wasn't relevant. For that matter, his investigation was so sloppily done that it would have been difficult to establish a foundation for an expert opinion under ER 702. Wyatt refers to his "considered opinion" at page 28 of her Opening Brief, but apart from the fact that she crossed the center line, it is not evident that he considered any other evidence in forming that opinion.

Wyatt argues that if Kinney's opinion that Wyatt was drunk was admissible, then Orf's expert opinion should also have been. Opening Brief at 29. But Kinney was directly behind Wyatt's car at the time Wyatt was driving it, and her "opinion" was based upon her observations. Orf's "opinion" was based on an abbreviated investigation in which he got no real information from anybody, including the victim, did not take measurements at the scene, took "terrible" photographs, and doesn't seem to have been aware of the extent of the victim's injuries. Kinney's opinion, if even was that,

was based on direct observation. There is no discernible basis for Orf's opinion.

Hypothetically, if Trooper Orf had done an adequate investigation and referred the case to the prosecutor's office to file charges of vehicular assault, it is not likely that the court would have permitted him to testify that in his opinion her driving was reckless. While ER 704 does permit a witness to give an opinion that goes to the ultimate issue to be decided by the jury, that would be essentially telling the jurors that one of the contested elements of the offense had been proven. Witnesses can, and here did, testify to the manner of Wyatt's driving; the jury can be, and here was, instructed as to the definition of recklessness; it is up to the jury to decide if that element has been proven. See *e.g.*, State v. King, 167 Wn.2d 324, 331-33, 219 P.3d 642 (2009).

The trial judge may have been annoyed that Wyatt was first issued a civil infraction, but the fact remains that the investigating officer simply did an inadequate job. Permitting him to testify about the earlier citation would have been a windfall for Wyatt, while prejudicing the State. She is, understandably, more concerned with her own rights than those of the victim, but the State is responsible for implementing the legislative policy that "the rights

extended . . . to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less rigorous than the protections afforded criminal defendants.” RCW 7.69.010. The victim was entitled to have the case pursued, and the implication that somehow this case was improperly prosecuted is incorrect.

Wyatt claims that the exclusion of Orf’s earlier decision prejudiced her because the other evidence of recklessness was inconclusive. Opening Brief at 35. On the contrary, as will be discussed in the next section, the evidence was very strong. The trial court did not err in excluding the evidence that Trooper Orf originally cited Wyatt for second degree negligent driving.

3. There was sufficient evidence presented to prove that Wyatt drove in a reckless manner, and therefore the evidence supported the conviction for vehicular assault.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are

equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The elements of vehicular assault were explained to the jury in Instruction No. 7. CP 76. Wyatt never disputed that she hit the victim or that he suffered substantial bodily harm. The only element she contested was that she drove her vehicle in a reckless manner. Reckless driving was defined for the jury in Instruction No. 10: "To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences." CP 79. Wyatt maintains that her driving was merely negligent or

incompetent. In fact, she argues that her driving was actually excessively cautious. Opening Brief at 38.

The evidence of Wyatt's driving came from three witnesses, but the one who had the best opportunity to observe it was Kinney. She followed Wyatt for approximately five and a half miles. RP 34. She observed Wyatt driving under the speed limit by 10 miles per hour, and over the speed limit by 10 miles an hour. RP 33. Wyatt was swerving back and forth, crossing both the center line and the fog line. RP 33-34; 38. Kinney had the window of her own car rolled down and she heard Wyatt's car cross the center rumble strip at least five times. RP 39. Ziesner, the victim, testified that Wyatt's vehicle was entirely in his lane. RP 55, 72-73. He moved to his right and was "about on the fog line" when Wyatt hit him. RP 56. She not only crossed the center line and went into the oncoming lane of travel, she went clear to the fog line. Instead of immediately stopping, she traveled back to her own lane and stopped on the shoulder. RP 42, 58, 78. Jody Bywater, arriving at the scene immediately after the collision, saw Wyatt's car moving slowly back into its own lane, as if it had been stopped and was picking up speed to move on. RP 77. It was apparent that she stopped because her left front tire had separated from the wheel. RP123.

The jury is the sole judge of the weight to be given the evidence, and there was more than enough evidence presented for a rational trier of fact to find Wyatt's driving rash or heedless, or indifferent to the consequences. Again Wyatt lists all the things she didn't do, but minimizes the things she did do, and those things were enough to convince an unbiased jury that her driving was reckless. Wyatt did not help her case when she told Detective Gunderson, in March of 2011, that on the day of the collision she had been at two Olympia hospitals and ended up in Tenino without realizing it. RP 153-54.

A person who is simply a bad driver might cross the centerline once or twice, the fog line once or twice, might speed or drive below the speed limit. But to drive the distance that Wyatt drove, continually displaying an inability or unwillingness to stay in her own lane of travel and at a consistent speed, can only be considered indifferent to the consequences. Pulling over might have been a cautious act, but then she got back onto the highway, and within minutes struck the victim hard enough to cause serious injury. A motorcyclist is surely at a disadvantage in a collision with a car, and the fact that his injury was so serious does not alone prove reckless driving. But Wyatt hit him hard enough to separate

her own tire from the wheel, which common experience indicates must have taken substantial force. The evidence was more than sufficient to prove reckless driving.

D. CONCLUSION.

The courts evidentiary rulings were correct and there was ample evidence to support the conviction for vehicular assault. The State respectfully asks this court to affirm her conviction.

Respectfully submitted this 18th day of September, 2012.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

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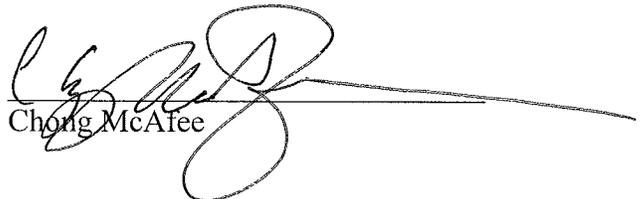
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I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 18th day of September, 2012, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

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