

No. 47558-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Docie Burch,

Appellant.

Mason County Superior Court Cause No. 14-1-00554-7

The Honorable Judge Amber Finlay

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Docie Burch's convictions violated her Fourteenth Amendment right to due process.
2. The court's instructions relieved the state of its burden to prove the essential elements of each offense.
3. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
4. The court's "to convict" instructions allowed conviction absent proof of ordinary negligence, an essential element of vehicular assault and vehicular homicide by means of intoxicated driving.
5. The court's instructions as a whole allowed the jury to convict Ms. Burch of vehicular homicide and vehicular assault by means of intoxicated driving without proof of ordinary negligence.
6. The trial court erred by giving Instruction No. 13.
7. The trial court erred by giving Instruction No. 17.

ISSUE 1: A "to convict" instruction must include every essential element of an offense. Did the court's "to convict" instructions allow conviction without proof of ordinary negligence, an essential element of vehicular homicide and vehicular assault by means of intoxicated driving?

ISSUE 2: Jury instructions in a criminal case violate due process if they relieve the prosecution of its burden to prove the elements of an offense. Must Ms. Burch's convictions be reversed because the court's instructions relieved the state of its burden to prove ordinary negligence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The roads were covered with ice on the morning of December 29, 2014 near the Tahuya River in Mason County. RP 47, 140. A bridge over the river was especially slick, and in one direction there was a curve just after the bridge. RP 45-47, 55-56, 74

A little after 7 that morning, Emily Hillis lost control of her vehicle and went off the road. Her car was stuck in the ditch. She made a report and left the area. RP 64, 74. Officers went to the area, took information, and left. No cones or warning of any kind were put up at the site. RP 36, 50, 64-65, 73, 89.

Then around 8 am, another car going the same direction lost control in the same spot. RP 65, 90, 107, 112, 182. While the gravel truck had gone by in the interim, it was unclear that adequate gravel was put in the locations necessary to maintain traction in the curve. RP 76-86, 186, 228-229, 294-305, 323-332.

Dennis Haase and Neil Erickson had stopped to help, seeing the car off the road from the first accident. RP 34. This second car to lose

control, with both Docie Burch and Darren Conklin in it, hit and killed Haase.¹ Erickson was also hit and hurt. RP 32-35, 106-108.

The state charged Docie Burch with vehicular homicide and vehicular assault, alleging that she drove under the influence. CP 48-49.

The court instructed the jury on the elements of vehicular assault:

1. That on or about the 29th day of December, 2014 the defendant drove a vehicle;
2. That the defendant's driving proximately caused substantial bodily harm to another person;
3. That at the time the defendant
 - a. drove the vehicle in a reckless manner; or
 - b. was under the influence of intoxicating liquor or drugs; or
 - c. drove the vehicle with a disregard for the safety of others; and
4. That this act occurred in the State of Washington CP 39-40.

The elements of vehicular homicide were given as follows:

- (1) That on or about the 29th day of December, 2014, the defendant drove a motor vehicle;
- (2) That the defendant's driving of the motor vehicle proximately caused injury to another person;
- (3) That at the time of causing the injury, the defendant was driving the motor vehicle
 - (a) while under the influence of intoxicating liquor or drugs; or
 - (b) in a reckless manner; or
 - (c) with disregard for the safety of others;
- (4) That the injured person died within three years as a proximate result of the injuries, and
- (5) That the defendant's act occurred in the State of Washington

¹ The state alleged that Ms. Burch was the driver. This was contested at trial. RP 52-53, 67-68, 110, 124-126, 176, 272-277, 287-322, 420, 431-432 .

CP 43.

In instructions 11 and 16, the trial judge defined recklessness:

To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to consequences.

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 ordinary negligence. 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 or the failure to do something which a reasonably careful person would have done under the same or similar circumstances. Ordinary negligence in operating a motor vehicle does not render a person guilty of vehicular (assault/homicide). CP 37, 42.

The jury convicted Ms. Burch on both counts. After sentencing, she timely appealed. CP 5-19.

ARGUMENT

THE COURT’S “TO CONVICT” INSTRUCTIONS RELIEVED THE PROSECUTION OF ITS OBLIGATION TO PROVE ORDINARY NEGLIGENCE, AN ESSENTIAL ELEMENT OF VEHICULAR HOMICIDE AND VEHICULAR ASSAULT COMMITTED BY MEANS OF INTOXICATED DRIVING.

Vehicular homicide and vehicular assault, when committed by means of driving under the influence, are not strict liability crimes. *State v. Lovelace*, 77 Wn. App. 916, 919, 895 P.2d 10 (1995); *State v. McAllister*, 60 Wn. App. 654, 659, 806 P.2d 772 (1991) *abrogated on other grounds by State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005). Instead, the prosecution must prove beyond a reasonable doubt

that the intoxicated driver's ordinary negligence injured or killed another person. *Lovelace*, 77 Wn. App. at 919; *McAllister*, 60 Wn. App. at 659.

A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the court's elements instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed.² *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Here, the court's "to convict" instructions did not require proof of ordinary negligence to establish the DUI alternative of each offense. CP 39, 43. This omission requires reversal of Ms. Burch's convictions.³ *Smith*, 131 Wn.2d at 263.

Due process prohibits a trial judge from instructing jurors in a manner that relieves the state of its burden of proof. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). Furthermore, jury instructions must make the relevant legal standard

² This is so even if the missing element is supplied by other instructions. *Id*; *Lorenz*, 152 Wn.2d 22 at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

³ The improper instructions created manifest error affecting Ms. Burch's right to due process. The issue can be addressed for the first time on review. RAP 2.5(a)(3). Furthermore, the court should review the error even if it does not qualify under RAP 2.5(a)(3). *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). If a jury can construe a court’s instructions to allow conviction without proof of an element, any resulting conviction violates due process. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

The court defined the phrase “ordinary negligence” to distinguish it from recklessness and disregard for the safety of others. CP 37, 42. However, instead of clarifying that ordinary negligence is required for conviction under the DUI means, the court specifically told jurors “[o]rdinary negligence in operating a motor vehicle does not render a person guilty of vehicular assault/homicide.” CP 37, 42.

This misstatement was not corrected elsewhere in the court’s instructions. CP 24 – 47. Far from making the relevant standard manifestly clear, the instructions relieved the state of its burden to prove ordinary negligence as part of the DUI means of committing each offense.

Constitutional error is presumed prejudicial, and the state must show harmlessness beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). The prosecution cannot show harmlessness in this case.

The jury acquitted Ms. Burch under the reckless means and could not agree that she’d driven with disregard for the safety of others. CP 20,

21. Furthermore, accidents occurred frequently at the location where Ms. Burch lost control of her truck, and another driver's vehicle had left the road that very morning. RP 47, 55-56.

Conviction under the DUI prong turned on whether or not Ms. Burch drove with adequate care. The evidence on this point was conflicting. Accordingly, the state cannot show harmlessness beyond a reasonable doubt. *Id.*

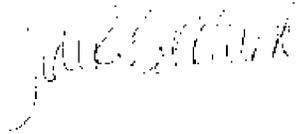
Ms. Burch's convictions must be reversed and the case remanded. *Id.* On retrial, the court must instruct jurors that conviction of vehicular assault and vehicular homicide by means of intoxicated driving requires proof of ordinary negligence.

CONCLUSION

The trial court's instructions relieved the state of its burden of proving ordinary negligence. Ms. Burch's convictions for vehicular assault and vehicular homicide by means of DUI must be reversed, and the charges remanded for a new trial with proper instructions.

Respectfully submitted on September 8, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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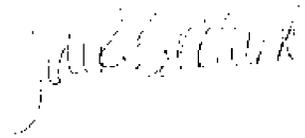
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 September 8, 2015.



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September 08, 2015 - 1:53 PM

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