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NO. 96217-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

DEAN MASAO IMOKAWA, Respondent

FROM THE COURT OF APPEALS, DIVISION II
CASE NO. 49995-9

SUPPLEMENTAL BRIEF OF PETITIONER

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IDENTITY OF PETITIONER

The State of Washington, plaintiff in the trial court and respondent in the Court of Appeals, is the petitioner herein.

DECISION BELOW

This Court has granted the State's petition for review, which sought review of the Court of Appeals, Division II, published opinion filed on July 24, 2018, reversing the defendant's convictions for vehicular homicide and vehicular assault because it found the pattern jury instructions were constitutionally deficient.

ISSUES PRESENTED

- I. Whether the Court of Appeals erred in finding that instructing the jury pursuant to Washington Pattern Jury Instructions – Criminal 90.08 and 90.07 violate due process.**
- II. Whether the Court of Appeals erred in holding that the jury instructions as a whole did not clearly assign the burden of proof for all essential elements of the crimes to the State.**
- III. Whether the Court of Appeals erred in finding the error was not harmless.**

STATEMENT OF THE CASE

Dean Imokawa (hereafter 'Imokawa') was convicted after a jury trial of vehicular homicide and vehicular assault. The convictions arose out of a

collision Imokawa was involved in on the morning of April 2, 2015 on State Route 503 (hereafter 'SR 503') in Clark County, State of Washington. SR 503 has two lanes of travel that head north and two lanes that head south. RP 220. On April 2, 2015, Imokawa was driving his full-size GMC truck north on SR 503. RP 203, 357-58. Several other vehicles were on SR 503 going north at the same time. John Gain was driving north in the left lane and as he continued after stopping at a traffic light, Imokawa came up on him from behind, changed into the right lane, passed Mr. Gain, and switched back into the left lane. RP 294-95. Imokawa then came upon Nicholas Grier's black Land Rover, being driven in the left lane. RP 300. About 3 to 4 car lengths in front of Mr. Grier, Steven Wicklander was also driving in the left lane; he had set his cruise control at 59 or 60mph in the 55mph zone. RP 325-29, 338. Mr. Grier maintained his speed and distance behind Mr. Wicklander. RP 330. There was also a vehicle driving about 1 car length behind Mr. Wicklander in the right lane. RP 329-30.

Imokawa drove his vehicle very close to the back of Mr. Grier's vehicle and flashed his headlights, indicating he wanted Mr. Grier to move into the right lane. RP 303, 357-58, 675-76. Mr. Grier tapped on his brakes, signaling to Imokawa that he was too close. RP 358-59, 385-86. Imokawa backed off for a short time, and then drove up very close to the

back of Mr. Grier's vehicle again. RP 359-60. Imokawa then increased his speed up to approximately 70mph as he switched into the right lane and attempted to pull in front of Mr. Grier's vehicle. RP 332-33, 361-61. At the time, there was a vehicle just ahead of Mr. Grier in the right lane, and Mr. Wicklander was still 3 to 4 car lengths ahead of Mr. Grier in the left lane. RP 330-34. Several witnesses to what happened next wondered what Imokawa was doing and where he was trying to go as it did not appear he had enough room to safely change lanes. RP 302, 305, 320-21, 340-41, 364, 369.

Yet, Imokawa sped up, put on his left turn signal, and moved his car to change lanes from the right lane into the left. RP 361-65, 392-93, 682-83. At the time he made the lane change, Imokawa's rear tires of his full-sized truck were equal with the front tires of Mr. Grier's Land Rover. *Id.* As he maneuvered his vehicle to the left, his back rear tires, wheel well and bumper hit the front right side of Mr. Grier's vehicle, tearing off the headlamp assembly. RP 371. The collision between Imokawa's truck and the Land Rover caused Imokawa to skid sideways and lose control of his vehicle. RP 361-65, 392-93. Imokawa's vehicle headed west into the oncoming lanes of travel. RP 366. Ms. Dallum, driving a vehicle on southbound SR 503, saw Imokawa's truck suddenly swerve into her lane; despite hitting her brakes and turning her steering wheel, she was unable

to avoid hitting Imokawa's truck. RP 474. Both Ms. Dallum's vehicle and Imokawa's truck hit the guardrail on the west side of the road. RP 366-68.

As a result of the accident, Ms. Dallum suffered numerous injuries and spent four days in the hospital. RP 446-48. Ms. Dallum's mother, Eleanor Tapani, the front seat passenger in Ms. Dallum's vehicle that morning, was gravely injured by the crash and died the following day. RP 442.

Washington State Patrol Trooper Matthew Hughes documented the evidence on the road and the damage to the vehicles. RP 216-47. He determined that Imokawa's truck hit the Land Rover with its left rear quarter panel. RP 225-27, 272-74. Trooper Hughes also found the Land Rover's right headlamp assembly inside Imokawa's back left wheel well. RP 226. From analyzing the event recorder on Imokawa's truck, investigators determined that 5 seconds before Imokawa's airbags were deployed, the truck was traveling 68mph. RP 615-17, 627. Imokawa's airbags deployed when his vehicle hit the guardrail. RP 606, 611. Investigators forensically mapped the scene of the collision, took photographs, interviewed witnesses, analyzed the damage to the vehicles and the marks on the road; based on all that evidence, investigators determined that Imokawa's truck hit Mr. Grier's as he was attempting to

change lanes. RP 555-65. Investigators found no evidence that Mr. Grier's vehicle hit Imokawa's truck. RP 562.

Imokawa's defense at trial was that Mr. Grier increased his speed as Imokawa was trying to pass him, thus preventing Imokawa from safely passing him and became a superseding intervening cause of the harm. RP 173, 177, 815-16, 826, 831-35. Imokawa testified that Mr. Grier sped up to hit his vehicle as he changed lanes. RP 659, 661-63, 678-79, 685-86, 694. Mr. Grier indicated he did not speed up or maneuver to prevent Imokawa from passing him. RP 362-69. Mr. Gain testified that he did not believe the Land Rover had increased its speed, but he could not say for sure. RP 307. Mr. Wicklander did not see Mr. Grier speed up. RP 333, 339.

At the crash scene, Imokawa told law enforcement that he was not sure what had happened, that he was passing a black Land Rover and then lost control and was struck by a vehicle traveling southbound and hit the guardrail. RP 203. Later, at the hospital, Imokawa said that he tried to change lanes, but the Land Rover sped up to cut him off. RP 524.

Imokawa asked the trial court to give non-pattern jury instructions on the "to-convict" instructions for both vehicular homicide and vehicular assault, to include an element that Mr. Grier's driving was not a superseding cause of the harm, and on superseding cause, adding to the

pattern instruction that the State had the burden to prove Mr. Grier was not a superseding cause of the harm. CP 28-31, 33-34; RP 703-05, 716-19. The trial court denied Imokawa's request and gave the standard pattern instructions. CP 56-63.

The jury convicted Imokawa of vehicular homicide and vehicular assault. CP 74-77; RP 847-48. On appeal, Imokawa argued the trial court erred in failing to give his proposed instructions on the elements of the two crimes and on superseding cause. The Court of Appeals held that the State has the burden of proving there was no superseding cause of the harm when it is raised by the defense, and that the pattern instructions did not instruct the jury that the State held this burden. *See slip op.* p. 1. The Court of Appeals reversed Imokawa's convictions. *Id.* The State sought review of this decision, which was granted.

ARGUMENT WHY THE COURT OF APPEALS SHOULD BE REVERSED

A. THE JURY INSTRUCTIONS CONVEYED TO THE JURY THAT THE STATE BORE THE BURDEN OF PROOF.

The Court of Appeals erroneously found that the instructions given by the trial court in Imokawa's case did not clearly inform the jury that the State bears the burden of proof. The instructions given below correctly set forth the elements of the crime and clearly explained that the State had to prove each element of each crime beyond a reasonable doubt. When read

as a whole, the instructions appropriately conveyed the State's burden and did not place any burden of proof on the defendant.

A trial court must instruct the jury that the State bears the burden of proving the essential elements of the crimes charged beyond a reasonable doubt, and the instructions must communicate that the State carries the burden of proof. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (citation omitted). It is reversible error to instruct the jury in a way that relieves the State of its burden of proving every element of each crime beyond a reasonable doubt. *Id.* (citation omitted). In addition, “[i]nstructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case.” *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A reviewing court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. *Bennett*, 161 Wn.2d at 307 (citation omitted).

Washington's pattern jury instructions (WPIC) were drafted and approved by a committee made up of judges, law professors, and attorneys, and they were adopted to assist trial courts in instructing juries. *Bennett*, 161 Wn.2d at 307. WPICs tend to be the preferred method in instructing juries given their approval by a committee, and the “advantage of thoughtful adoption” they provide. *See id.* However, a pattern

instruction is not immune from attack simply because it was approved by the WPIC committee. *Id.* In this case, the Court of Appeals found that WPIC 90.08 and WPIC 90.07 were not adequate to inform the jury of the State's burden of proof and did not inform the jury that the State bore the burden of proving the absence of a superseding cause, thus depriving Imokawa of his constitutional right to due process. *See Slip op.* p. 10.

In addition to the pattern instructions on proximate cause, WPICs 90.07 and 90.08, the trial court gave several instructions that touched on the State's burden of proof. The Court of Appeals erred by failing to consider the other instructions the trial court gave the jury that clearly communicated that the defendant bore no burden of proof and the State bore the burden of proving all elements of the crimes beyond a reasonable doubt. *See CP 50, 58, 63.* When the instructions are read as a whole, it was clearly communicated to the jury that Imokawa bore no burden of proof.

While the jury instruction on superseding cause, WPIC 90.08, may be inartful, the standard of review is not whether the instructions given to the jury were perfect or worded in the way a reviewing Court sees as preferable. Instead, the reviewing Court must examine the jury instructions as a whole, and determine whether they were sufficient to satisfy due process. *See Bennett*, 161 Wn.2d at 315. This Court has previously found that a trial court's instruction on reasonable doubt passed

constitutional muster even though the Court did not endorse it. *Id.* Indeed, while an instruction may be constitutionally adequate, “it does not mean that it is a good or even desirable instruction.” *Id.* In *Bennett*, this Court found the *Castle* instruction on reasonable doubt was constitutionally adequate, even though it was not the preferred instruction on reasonable doubt. *Id.* at 317. Importantly, this Court found this reasonable doubt instruction was still constitutional even though it found the language of the instruction “problematic” and that it emphasized what the State need *not* prove instead of describing the State’s burden. *Id.* The instruction on superseding cause given in Imokawa’s case suffers the same malady as the *Castle* instruction: while it is inartful, and potentially “problematic,” it is not unconstitutional, and it is clear Imokawa’s rights were not violated, especially when all the instructions given to the jury are considered.

The trial court in this matter instructed the jury that the State had the burden of proving each element of each crime beyond a reasonable doubt and that Imokawa had no burden of proving a reasonable doubt. CP 50. The trial court also instructed the jury that Imokawa is presumed innocent. *Id.* Additionally, in each to-convict instruction, the trial court instructed the jury that to convict it must find that all the elements of the crime had been proven beyond a reasonable doubt, but that if they had a reasonable doubt as to any element, it was their duty to return a verdict of

not guilty. CP 58, 63. One of the elements given to the jury for each crime was that Imokawa's driving was a proximate cause of the harm. CP 58, 63; RCW 46.61.520; RCW 46.61.522.

On the subject of proximate cause and superseding cause, the trial court instructed the jury pursuant to WPIC 90.07 and 90.08 in jury instructions 9, 10, 14, and 15. As given, the instruction on proximate cause regarding the vehicular homicide count instructed the jury that

To constitute vehicular homicide, there must be a causal connection between the death of a human being and the driving of a defendant so that the act done or omitted was a proximate cause of the resulting death.

The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.

There may be more than one proximate cause of a death.

CP 56. This instruction given to Imokawa's jury mirrors WPIC 90.07. A substantially similar instruction was given in the vehicular assault count.

CP 61. The jury was also instructed on what conduct is not a proximate cause. The trial court instructed the jury,

If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death, it is not a defense that the conduct or driving of the deceased or another may also have been a proximate cause of the death.

However, if a proximate cause of the death was a new independent intervening act of the deceased or another which the defendant, in the exercise of ordinary care should

not reasonably have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's act has been committed.

However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant should have reasonably anticipated.

CP 57. This instruction, also given in a slightly changed version for the vehicular assault count, mirrors WPIC 90.08.

Thus, instructions 10 and 15 define a superseding intervening event and explain that the existence of a superseding intervening event precludes the defendant's conduct from being a proximate cause of the harm. These instructions in combination with the definition of proximate cause, given as instructions 9 and 14, defined both superseding intervening event and proximate cause so as to inform the jury under what circumstances Imokawa's conduct may not have been a proximate cause of the harm. Instructions 10 and 15 explain that the proximate cause element is lacking if a new independent cause breaks the direct sequence between the defendant's act and the harm.

Of significant importance are the court's instruction numbers 11 and 16, which instructed the jury that in order to convict Imokawa they had to find that his driving proximately caused the harm beyond a reasonable doubt. CP 58, 63. This, combined with the court's prior instruction that the State had to prove each element beyond a reasonable doubt, clearly communicated to the jury that the State bore the burden of proving the defendant's driving was a proximate cause of the harm. The jury instructions placed no burden of proof on the defendant. While the instructions may have been somewhat clunky, they sufficiently explained what was and was not a proximate cause. From the instructions it was clear that in order to convict the defendant the jury had to find no superseding intervening cause beyond a reasonable doubt as they had to find Imokawa's driving was a proximate cause of the harm and the instructions told the jury if there was a superseding intervening cause then Imokawa's driving was not a proximate cause. The instructions allowed the jury to appropriately consider whether the State had proven that Imokawa's actions were a cause of the harm, and whether there was a superseding intervening cause that would negate Imokawa's liability.

In *State v. Souther*, 100 Wn.App. 701, 998 P.2d 350 (2000), the defendant, convicted of vehicular homicide, claimed on appeal that the jury instruction on superseding cause was improper. The jury was

instructed on proximate and superseding cause in two separate instructions pursuant to the WPICs, as was the jury in Imokawa's case.¹ On appeal, Souther argued that these pattern instructions did not make it manifestly apparent to the jury that a superseding cause was a defense to vehicular homicide. *Id.* at 708. Souther specifically argued that the "sentence informing what constitutes a superseding cause [was] buried between sentences explaining when a superseding cause is not a defense." *Id.* There, the Court of Appeals agreed that while the "instruction on superseding cause is confusing," the second sentence "tells the jury that conduct by the deceased that is a proximate cause of the death *is*, in effect, a defense if such conduct was a later independent intervening act not reasonably foreseeable." *Id.* at 708-09.

The reasoning in the Court of Appeals decision in Imokawa's case follows the defendant in *Souther's* argument, which has been rejected. Below, the Court of Appeals reasoned that "the instruction regarding superseding cause focuses primarily on what is *not* a defense to proximate cause," and that this emphasis on what is *not* a defense and what is *not* a superseding cause conveyed to the jury that Imokawa had to affirmatively prove the existence of a superseding cause. Slip op. at 11. In *Souther*,

¹ In *Souther*, the jury was instructed on proximate cause under WPIC 25.02 and superseding cause under WPIC 25.03. *Souther*, 100 Wn.App. at 706.

supra the Court considered this same claim and found the instructions did “not unduly emphasize the State’s case over the defendant’s.” *Id.* at 709.²

Importantly, after *Souther*, the WPIC committee amended WPIC 25.03, the superseding cause instruction given in *Souther*, to make it less confusing. *See* Comment to WPIC 25.03. The amended WPIC 25.03 is now nearly identical to WPIC 90.08, the instruction given in Imokawa’s case, the only differences being those that make it specific to a driving offense. Thus, the *Souther* Court found the superseding cause instruction, while confusing, did tell the jury that a superseding cause was a defense to vehicular homicide and it did not unduly emphasize the State’s case over the defendant’s, and then that instruction was amended to make it more clear. The jury in Imokawa’s case was instructed on this updated, clearer version of the instruction. The Court of Appeals’ reasons for finding WPIC 90.08 was deficient is in direct contradiction to the *Souther* opinion and did not consider that the instruction given in Imokawa’s case was *less* confusing even than the one given in *Souther*.

The Court of Appeals below also took issue with the first sentence of WPIC 90.08, which it interpreted as instructing the jury “not to consider the existence of a superseding cause until after it had determined that the

² The Court in *Souther* did not decide whether giving the *entire* instruction was improper (as the defendant was arguing the Court should not have given the third paragraph of the superseding cause instruction), it found that potential error was harmless. *Souther*, 100 Wn.App. at 709.

State proved proximate cause beyond a reasonable doubt.” Slip op. at 11.³ The instruction did not explicitly tell the jury not to consider superseding cause until after it had determined proximate cause, but the language reflects the complexity of the interplay between proximate cause and superseding cause. Based on the interplay between these two concepts, it is natural to consider whether the defendant’s conduct is a proximate cause under the standard definition, and then determine whether any superseding cause negates the defendant’s conduct as a cause. And the instruction clearly explains that if there is a superseding cause that the defendant’s act is *not* a proximate cause, thus negating what could be the jury’s finding that the defendant’s act initially appeared to meet the first proximate cause definition. Additionally, in Imokawa’s case, the order of the jury instructions also adds to the basis for finding the court sufficiently instructed the jury. Both the definition of proximate cause and the superseding cause instructions were given before the instructions outlining the elements of both vehicular homicide and vehicular assault. CP 56-58, 61-63. Thus, before they were told what elements it had to find beyond a reasonable doubt, the jury was told what a proximate cause was defined as and what types of situations precluded the defendant’s actions from being a proximate cause. After those two instructions, the jury was told it must

³ Imokawa’s proposed instruction also included this same language. CP 28-29.

find the defendant's driving was a proximate cause beyond a reasonable doubt.

Based on the order of the instructions, the repeated times the trial court informed the jury of the presumption of innocence and the state's burden of proof, the State's and defendant's statements throughout opening and closing arguments, and the fact that there was no statement indicating the defendant had any burden of proof, nor was there any argument he did, it is clear the jury was sufficiently instructed that the State bore the entire burden of proof, including proving that there was no superseding intervening cause of the harm. The Court of Appeals erred in finding that the use of WPIC 90.07 and 90.08 violated Imokawa's constitutional right to due process by diluting the State's burden of proof. There is no doubt the jury was properly informed of the State's burden in this case.

B. UNDER THE TOTALITY OF THE CIRCUMSTANCES, IMOKAWA RECEIVED A CONSTITUTIONALLY FAIR TRIAL

Even when a trial court erroneously fails to give an instruction informing the jury that the burden of proof is on the State and not the defendant, the instructions are not necessarily constitutionally deficient as a whole. *State v. Cox*, 94 Wn.2d 170, 615 P.2d 465 (1980). In any criminal case, the instructions to the jury must indicate that the burden is on the

state to prove each element by that standard. *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). The function of informing the jury that the burden of proof is on the State and not the defendant “could conceivably be achieved by either of two means: an instruction specifically identifying the State as the party bearing the burden of proof, or the presumption of innocence instruction which declares the defendant innocent until proven guilty.” *Cox*, 94 Wn.2d at 174. Omission of an instruction that specifically says the burden is on the state is not per se reversible error. *Id.*

In *Cox*, the trial court inadvertently omitted the instruction that told the jury the burden of proof is on the State. *Cox*, 94 Wn.2d at 172-73. The Supreme Court held that when such an error is made, they will look to the totality of the circumstances to determine “whether the jury was adequately informed of the allocation of burden of proof.” *Id.* at 175. The Court found that the totality of the circumstances in *Cox* showed that the jury was adequately informed of the allocation of the burden of proof. *Id.* The Court based this decision on the fact that the court gave the presumption of innocence instruction, that the trial judge told the jury twice at the beginning of voir dire that the State bears the burden of proof, that defense counsel emphasized this burden during voir dire and closing argument, and that the prosecutor acknowledged this burden as well. *Id.*

Therefore, despite the significant omission in the instructions, the defendant received a constitutionally fair trial. *Id.*

Imokawa's case is similar to *Cox*. Under the totality of the circumstances test adopted in *McHenry* and *Cox*, it is clear that Imokawa received a constitutionally fair trial. In addition to the written jury instructions, the trial court orally advised the jury the defendant was presumed innocent and the state bore the burden of proof.⁴ RP 111. In opening statements, the state indicated the burden of proof was beyond a reasonable doubt, and Imokawa told the jury that the State has the burden of "proving beyond a reasonable doubt that the conduct of Nick Grier was not the superseding cause of this accident." RP 172, 177. In closing arguments Imokawa emphasized the State's burden to prove no superseding cause, and the State argued that Nick Grier did not do any act which would have superseded the defendant's negligent act. RP 815-16, 826, 831-35. Throughout the trial it was made clear to the jury, repeatedly, that the State bore the burden of proving every element of the crimes beyond a reasonable doubt. Imokawa received a constitutionally fair trial.

⁴ The trial court read aloud from portions of WPIC 1.01 and 4.01 at the beginning of voir dire. RP 111-12.

C. ANY ERROR WAS HARMLESS

Not all erroneous instructions relieve the State of its burden of proof. *See State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). When an instruction given to the jury was erroneous, the Court may consider whether the error was harmless. *Id.* If a reviewing Court can “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error,” the error is harmless. *Id.* at 341 (citation omitted). The Court of Appeals erred in finding any instructional error was not harmless. The evidence overwhelmingly showed Imokawa was guilty beyond a reasonable doubt and this Court can conclude that the jury verdict would have been the same even if other instructions had been given.

The jury clearly rejected Imokawa’s version of events, or even if they accepted them did not find that the other driver’s actions were unforeseeable. No matter what Nicholas Grier did, whether he did or did not speed up, the evidence at trial clearly showed Imokawa drove negligently and with a disregard for the safety of others when he drove well above the speed limit and in a dangerous manner trying to pass another vehicle. Whether Mr. Grier sped up as Imokawa claims, or did not as all the other evidence would suggest, Imokawa is the one whose negligent act caused the accident. There is no possibility the jury would have found a superseding intervening event that Imokawa should not have

foreseen no matter how the court had instructed the jury. The Court of Appeals erred in finding the error was not harmless.

CONCLUSION

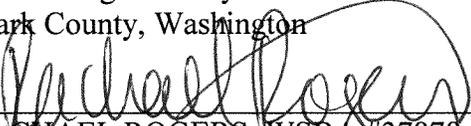
Imperfect jury instructions are not necessarily unconstitutional. The Court of Appeals erred in finding that the pattern instructions on proximate cause and superseding cause violated the defendant's right to due process by shifting the burden of proof on to him. When taken as a whole, the court's instructions to the jury clearly assigned the burden of proving all the elements of the crimes beyond a reasonable doubt to the State. The jury necessarily found, beyond a reasonable doubt, that there was no superseding intervening event which would have precluded the defendant's conduct from being a proximate cause. The Court of Appeals should be reversed. WPICs 90.07 and 90.08, while not perfect or possibly even preferable, are constitutionally sufficient.

DATED this 5th day of February, 2019.

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