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NO. 96217-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

DEAN IMOKAWA, Respondent

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

PETITION FOR REVIEW

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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

Petitioner, the State of Washington, seeks 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. A copy of the opinion of the Court of Appeals is attached.

ISSUES PRESENTED

- I. Whether this Court should grant review because the Court of Appeals decision poses a significant question of constitutional magnitude and involves an issue of substantial public interest that should be determined by the Supreme Court.**
- II. 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.**
- III. 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.**
- IV. 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.*

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

- A. THIS COURT SHOULD GRANT REVIEW OF THE DECISION OF THE COURT OF APPEALS PURSUANT TO RAPS 13.4(B)(3) AND (4).

At the end of trial, the jury was instructed based on Washington pattern jury instructions (WPIC). RP 761-77. Those instructions included WPIC 4.01, on the presumption of innocence and the burden of proof;

WPIC 90.07, the definition of proximate cause for vehicular homicide and vehicular assault; WPIC 90.08, relating to superseding cause for both vehicular homicide and vehicular assault; WPIC 90.02, the elements of vehicular homicide; and WPIC 91.02, the elements of vehicular assault. CP 50, 56-58, 61- 63. The trial court did not deviate from the standard WPIC language in its instructions to the jury. *Compare* WPIC 4.01, 90.07, 90.08, 90.02, and 91.02 with CP 50, 56-58, 61-63. Thus in its opinion reversing Imokawa’s convictions for vehicular homicide and vehicular assault based on improper jury instructions, the Court of Appeals ruled that the standard jury instructions defining proximate cause and discussing superseding cause are deficient and when given in a court’s instructions to the jury violate the defendant’s due process rights. Because of the significant impact the Court of Appeals’ ruling will have on all vehicular homicide and vehicular assault cases in our State, this is an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b)(4). The issue is also one of constitutional magnitude as the Court of Appeals found the standard jury instructions used in this case acted to deny the defendant of due process. *See* RAP 13.4(b)(3). Accordingly, the State asks this Court to grant review pursuant to RAPs 13.4(b)(3) and (4).

B. 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 Wash.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.

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 the instruction. *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 preferable. *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 when considered in the context of all the instructions given to the jury.

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 15.¹ 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, defined both superseding intervening event and proximate cause so as to inform the jury under what circumstances Imokawa's conduct may not have been

¹ Jury instruction nos. 9 and 14 were the pattern describing proximate cause for both vehicular homicide and vehicular assault and mirrored WPIC 90.07. Jury instructions nos. 10 and 15 were the pattern instructions describing superseding cause for both vehicular homicide and vehicular assault mirroring WPIC 90.08.

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.² 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. 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

² The jury was instructed on proximate cause under WPIC 25.02 and superseding cause under WPIC 25.03. *Souther*, 100 Wn.App. at 706.

conveyed to the jury that Imokawa had to affirmatively prove the existence of a superseding cause. Slip op. at 11. In *Souther*, *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 709.³

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*.

³ 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.

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 State proved proximate cause beyond a reasonable doubt.” Slip op. at 11.⁴ 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

⁴ Imokawa’s proposed instruction also included this same language. CP 28-29.

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 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.

C. 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.⁵ 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.

⁵ The trial court read aloud from portions of WPIC 1.01 and 4.01 at the beginning of voir dire. RP 111-12.

D. 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

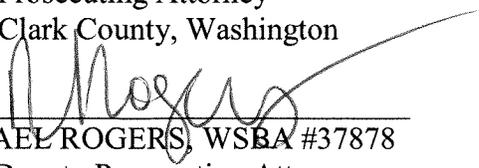
Imperfect jury instructions are not necessarily unconstitutional. The Court of Appeals erred in finding that the pattern instructions on proximate cause and superseding cause violated the defendant's right to due process by shifting the burden of proof on to him. When taken as a whole, the court's instructions 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 even preferable, are constitutionally sufficient.

DATED this 21st day of August, 2018.

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July 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DEAN MASAO IMOKAWA,

Appellant.

No. 49995-9-II

PUBLISHED OPINION

SUTTON, J. — Dean M. Imokawa appeals his convictions for vehicular homicide and vehicular assault. Imokawa argues that due process requires that the trial court instruct the jury that the State bears the burden to prove the absence of a superseding cause. Because the existence of a superseding cause negates the essential element of proximate cause, we hold that due process requires the State to prove the absence of a superseding cause when it is properly raised as a defense. Accordingly, the trial court erred by failing to instruct the jury that the State had the burden to prove the absence of a superseding cause. We reverse.

Imokawa also argues that the charges should be dismissed with prejudice because there was insufficient evidence to support the jury's verdicts finding Imokawa guilty of vehicular homicide and vehicular assault. Because there was sufficient evidence to support the jury's verdicts, dismissal with prejudice is not the proper remedy and we remand for further proceedings consistent with this opinion.

FACTS

On April 2, 2015, the GMC truck Imokawa was driving collided with Linda Dallum's Kia Sorrento. Eleanor Tapani, Dallum's mother, was a passenger in her car. Both Dallum and Tapani suffered serious injuries in the collision. Dallum was in a wheelchair for several months. Tapani died. The State charged Imokawa with vehicular homicide, vehicular assault, and reckless driving.

At Imokawa's jury trial, Nicholas Grier testified that, on April 2, he was driving his Land Rover north on State Route 503. Grier was driving in the left lane when he observed Imokawa's truck. Grier testified that Imokawa pulled within a few feet of the back bumper of his Land Rover and flashed its headlights. Grier tapped his brakes and waved his hand at Imokawa. Imokawa backed off as the vehicles approached a stoplight.

The light changed and the vehicles drove through the intersection without coming to a complete stop. Imokawa pulled up closely behind Grier's vehicle again. Imokawa slowed down and then pulled into the right lane. Imokawa passed Grier and then signaled that he was going to change lanes into the left lane. As Imokawa pulled in front of Grier, he hit Grier's vehicle. The impact turned Imokawa's truck sideways into oncoming traffic and it collided with Dallum's Kia. Then Imokawa's truck struck the guardrail.

Grier testified that there was another vehicle in front of him when Imokawa attempted to make the lane change. Grier did not believe that it was possible for Imokawa to make the lane change. Grier also testified that he did not speed up as Imokawa attempted to pass him.

Imokawa testified to almost the same series of events as Grier. However, Imokawa testified that he was sure that he had enough space to make the lane change safely. Imokawa

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testified that the collision occurred because, as he made the lane change, Grier accelerated to prevent him from passing and hit the back of his vehicle.

John Gain observed both vehicles prior to the collision. Gain testified that he was driving in the left lane when Imokawa pulled into the right lane to pass him. Gain then moved over into the right lane. Gain testified that he observed Imokawa pull up closely behind Grier and continue to follow him at a very close distance. Gain also observed Imokawa attempt to pass Grier. Gain testified that he thought the lane change was “tight.” II Verbatim Report of Proceedings (VRP) at 305. Based on his observations, he did not think that Imokawa was going to be able to make the lane change. Gain could not tell whether Grier accelerated as Imokawa attempted to make the lane change.

Steven Wicklander testified that he was driving in front of Grier at the time of the collision. Wicklander testified that he pulled in front of Grier and set his cruise control to 60 miles per hour. Wicklander was the leader of a group of vehicles all travelling about the same speed. Wicklander observed Imokawa approach in the left lane and noted that he was driving faster than the other vehicles in the lane. When Wicklander checked his mirrors again he saw Imokawa pull into the right lane to pass Grier. Wicklander checked his mirrors again and saw that Imokawa’s truck was sideways in front of Grier’s Land Rover.

Detective Justin Maier testified that several troopers from the Washington State Patrol responded to investigate the accident. Detective Maier was the lead detective investigating the collision. Based on all the evidence, Maier opined that Imokawa’s truck hit the Land Rover and that the Land Rover had not sped up before hitting Imokawa’s truck.

At trial, Imokawa argued that Grier's acceleration into Imokawa's vehicle was a superseding cause of the accident, and thus, Imokawa proposed modified versions of the Washington Pattern Jury Instructions (WPIC). Imokawa proposed the following jury instruction defining superseding cause:

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

However, if a proximate cause of substantial bodily harm or death was a new independent intervening act of 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 substantial bodily harm or death. An intervening cause is an action that actively operates to produce harm to another after the defendant's act has begun.

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 substantial bodily harm or death fall within the general field of danger which the defendant should have reasonably anticipated.

The State has the burden of proving beyond a reasonable doubt both (1) that conduct by the defendant was a proximate cause and, (2) that the conduct of Nicholas Grier did not constitute a superseding cause of the collision which resulted in the injuries and the death that occurred in this case.

Clerk's Papers (CP) at 28-29. Imokawa also proposed a "to-convict" instruction for vehicular homicide which included the following element:

(4) That the conduct of Nicholas Grier was not a superseding cause of the injuries sustained by Eleanor Tapani;

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CP at 30. And Imokawa proposed a “to-convict” instruction for vehicular assault which included the following element:

(4) That the conduct of Nicholas Grier did not constitute a superseding cause of the injuries sustained by Linda Dallum; and

CP at 33.

The trial court declined to give Imokawa’s proposed instructions. Instead, the trial court gave the standard WPIC pattern jury instructions including the standard pattern jury instruction on proximate cause. 11A WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 90.07, 90.08, at 276, 278 (4th ed. 2016). The trial court’s instructions did not include language requiring the State to prove that Grier’s conduct was not a superseding cause of the injuries to Dallum or Tapani.

The jury found Imokawa guilty of vehicular homicide and vehicular assault. By special verdict, the jury found that Imokawa was operating his vehicle with disregard for the safety of others. However, the jury also found that Imokawa was not guilty of reckless driving. The trial court sentenced Imokawa to a standard range sentence. Imokawa appeals.

ANALYSIS

I. DUE PROCESS

Imokawa argues that the existence of a superseding cause negates the essential element of proximate cause and, therefore, the State bears the burden of proving the absence of a superseding cause beyond a reasonable doubt. We agree.

The due process clause of the Fourteenth Amendment of the United States Constitution requires the State to prove every fact necessary to constitute the crime charged beyond a reasonable doubt. U.S. CONST. amend XIV, § 1; *State v. W.R.*, 181 Wn.2d 757, 761-62, 336 P.3d 1134 (2014).

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As a result, the State cannot require the defendant to disprove any fact that constitutes the crime charged. *W.R.*, 181 Wn.2d at 762. Accordingly, a defendant's right to due process may be violated if he or she is burdened with proving a defense. *See W.R.*, 181 Wn.2d at 762-63.

To determine whether the State may allocate the burden of proving a defense, we examine whether the defense negates an essential element of the crime charged. *W.R.*, 181 Wn.2d at 762; *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). If the defense negates an essential element of the crime charged, then due process requires that the burden be allocated to the State. *Acosta*, 101 Wn.2d at 616. As a result, the State must prove the absence of the defense as part of proving all essential elements of the crime beyond a reasonable doubt. *Acosta*, 101 Wn.2d at 616 (“Since proof of self-defense negates knowledge, due process and our prior cases require us to hold that the State must disprove self-defense in order to prove that the defendant acted unlawfully.”).

To determine whether a defense negates an essential element, we analyze each element of the crime charged. *Acosta*, 101 Wn.2d at 616. The essential elements of vehicular homicide are: (1) operating a motor vehicle (a) while intoxicated, (b) in a reckless manner, or (c) with disregard for the safety of others; (2) the driving was the proximate cause of injury to any person; and (3) the person died as a proximate result of the injury. RCW 46.61.520(1). The essential elements of vehicular assault are the same except that the driving must be the proximate cause of substantial bodily harm to another rather than death. RCW 46.61.522(1).

Because a superseding cause is related to an act other than the defendant's, a superseding cause does not relate to the defendant's operation of a motor vehicle or the resulting injury or death. The salient issue is whether a superseding cause negates the essential element of proximate cause.

“The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist.” *W.R.*, 181 Wn.2d at 765. For example, our Supreme Court has explained that self-defense necessarily negated the essential element of knowledge for second degree assault because it is “impossible for one who acts in self-defense to be aware of facts or circumstances ‘described by a statute defining an offense.’” *Acosta*, 101 Wn.2d at 616 (quoting RCW 9A.08.010(1)(b)(i)). Similarly, consent negates the essential element of forcible compulsion because:

The statute defines “forcible compulsion” as a “physical force which *overcomes resistance*, or a threat . . . that *places a person in fear of death or physical injury* to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010(6) (emphasis added). As defined, forcible compulsion contemplates force that overcomes actual resistance or threats that place a person in actual fear. There can be no forcible compulsion when the victim consents, as there is no resistance to overcome. Nor is there actual fear of death, physical injury, or kidnapping when the victim consents.

W.R., 181 Wn.2d at 765 (alteration in original).

Here, it is impossible for the defendant's driving to be a proximate cause of injury or death and for there to also be a superseding cause of the injury or death. In *State v. Rivas*, our Supreme Court explained,

Under RCW 46.61.520[,] an intoxicated defendant may still avoid responsibility for a death which results from his or her driving if the death is caused by a superseding, intervening event. In crimes which are defined to require specific conduct resulting in a specified result, the defendant's conduct must be the "legal" or "proximate" cause of the result. Before criminal liability is imposed, the conduct of the defendant must be both (1) the actual cause, and (2) the "legal" or "proximate cause" of the result.

126 Wn.2d 443, 453, 896 P.2d 57 (1995) (quoting Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 3.12, at 390 (1986)).

And *State v. Roggenkamp* explained the interaction between a proximate cause, an intervening cause, and a superseding cause. 115 Wn. App. 927, 64 P.3d 92 (2003), *aff'd*, 153 Wn.2d 614 (2005). "An intervening cause is a force that operates to produce harm *after* the defendant has committed the act or omission." *Roggenkamp*, 115 Wn. App. at 945. However, the existence of an intervening act alone is not sufficient to relieve the defendant of criminal liability—in order to be considered a superseding cause, an intervening cause must be one that is not reasonably foreseeable. *Roggenkamp*, 115 Wn. App. at 945. If there is a superseding cause, "then there is a break in the causal connection between the defendant's negligence and the plaintiff's injury." *Roggenkamp*, 115 Wn. App. at 945-46.

The defendant's driving is no longer a proximate cause of the injury or death if there is a superseding cause that breaks the causal connection. It is possible for an intervening cause to coexist with the defendant's driving as a proximate cause of the injury or death. However, it is impossible for the defendant's driving to be a proximate cause of the injury or death *and* for there to also be a superseding cause of the injury or death. Therefore, the two cannot coexist and a superseding cause negates proximate cause.

The State argues that this issue has already been resolved by *Roggenkamp* and *State v. Morgan*, 123 Wn. App. 810, 99 P.3d 411 (2004). However, *Morgan* is not controlling because *Morgan* did not address the due process issue of the allocation of the burden of proof. In *Morgan*, the court addressed whether the allegation of the existence of a superseding cause required the State to prove that the defendant's intoxication, rather than the defendant's driving, was a proximate cause of the death. *Morgan*, 123 Wn. App. at 813-17. *Morgan* also addressed whether the jury instruction language using "a proximate cause" as opposed to "the proximate cause" violated due process. 123 Wn. App. at 819-20 (emphasis added).

Roggenkamp actually addressed the allocation of burden of proof. 115 Wn. App. at 947. However, the court explicitly declined to analyze whether a superseding cause negated the essential element of a proximate cause because our Supreme Court "expressed 'substantial doubt' about the correctness" of the "'negates' analysis." 115 Wn. App. at 947 (citing *State v. Camara*, 113 Wn.2d 631, 639, 781 P.2d 483 (1989)).

In *W.R.*, our Supreme Court expressly overruled the holding in *Camara* and held that the appropriate test for determining the allocation of the burden of proof for the purpose of due process is "the negates an essential element analysis." 181 Wn.2d at 763-65. *Roggenkamp's* analysis of the due process issue and the allocation of the burden of proof are in direct conflict with recent Supreme Court precedent, *W.R.* Thus, we follow the explicit statement in *W.R.* and analyze whether a superseding cause negates a proximate cause to determine the allocation of the burden of proof.

Because we hold that a superseding cause negates the element of proximate cause, due process requires that the burden of proof be allocated to the State. Therefore, when a defendant adequately raises the existence of a superseding cause, as Imokawa did here, the State bears the burden to prove the absence of a superseding cause beyond a reasonable doubt.

II. JURY INSTRUCTIONS

Imokawa argues that the trial court's jury instructions did not adequately inform the jury of the State's burden because the instructions did not unambiguously inform the jury that the State had the burden to prove the absence of a superseding cause. Imokawa asserts that the trial court was required to give his proposed instructions stating that the State had to prove that "the conduct of Nicholas Grier did not constitute a superseding cause of the collision." Br. of Appellant at 20; CP at 29. We hold that the jury instructions defining superseding cause and proximate cause in this case were not adequate to inform the jury of the State's proper burden of proof.

When the State has the burden to prove the absence of a defense, the jury must be informed "in some unambiguous way" that the State must prove the absence of the defense beyond a reasonable doubt. *Acosta*, 101 Wn.2d at 621. "[A] specific instruction is preferable, but failure to provide one is not reversible *per se* so long as the instructions, taken as a whole, make it clear that the State has the burden." *Acosta*, 101 Wn.2d at 621.

Here, we hold that the jury instructions as a whole did not adequately inform the jury that the State had the burden to prove the absence of a superseding cause. The jury was instructed that the State had to prove that Imokawa's driving was a proximate cause of the death or injury. And the jury was instructed that "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

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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." CP at 57. However, the jury was instructed not to consider the existence of a superseding cause until after it had determined that the State proved proximate cause beyond a reasonable doubt. CP at 57 ("If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death . . ."). And the instruction regarding superseding cause focuses primarily on what is *not* a defense to proximate cause.

Considering the jury instructions as a whole, there is a distinct possibility that the burden of proof was unclear to the jury because the instructions imply that a superseding cause is not considered until after the State has already met its burden to prove all of the essential elements. And the emphasis in the jury instructions on what is *not* a defense or what is *not* a superseding cause made it appear that a superseding cause has to be affirmatively proven by Imokawa rather than the actual burden of the State to prove the absence of a superseding cause. Ultimately, the jury instructions in this case did not inform the jury "in some unambiguous way" that the State had the burden to prove the absence of a superseding cause. *Acosta*, 101 Wn.2d at 621. Therefore, we hold that the jury instructions violated due process by failing to inform the jury of the State's burden to prove the absence of a superseding cause beyond a reasonable doubt.

Although the jury instructions that were given in this case violated due process, the trial court did not err by refusing to give Imokawa's proposed "to convict" jury instructions. The "to convict" instructions must include all essential elements of the crime. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). However, Imokawa's proposed "to convict" jury instructions added an additional nonessential element to the offenses of vehicular homicide and vehicular

assault by specifically referencing that Grier's driving was not a superseding cause of the injuries or death. Although a superseding cause negates an essential element of the crime and the State must prove the absence of a superseding cause beyond a reasonable doubt, the absence of a superseding cause does not become an essential element of the crime. The essential element of the crime is still that the defendant's driving is the proximate cause of the injury or death. Therefore, although the jury must be instructed in some way that the State must prove the absence of the alleged superseding cause, the trial court did not err by refusing to give a "to convict" instruction that included an additional nonessential element of the crimes charged.¹

III. HARMLESS ERROR

Because we hold that the jury instructions in this case were improper, we must determine whether the error was harmless beyond a reasonable doubt. Because Imokawa presented evidence that could establish a superseding cause and ultimately the issue was a question of credibility for the jury, we hold that the erroneous jury instructions were not harmless.

Jury instructions that violate a defendant's right to due process require reversal unless the State can prove that the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

¹ This is the approach adopted for self-defense instructions. The instruction defining self-defense states,

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

11 WPIC 16.02, at 248. However, the "to convict" instructions do not change because the defendant claims self-defense. *See e.g.* 11 WPIC 26.02, at 383; 11 WPIC 26.04, at 388.

Here, Imokawa presented evidence that could establish a superseding cause because Imokawa testified that Grier accelerated and hit his car when he was changing lanes. This evidence was disputed because Grier testified that he did not accelerate and hit Imokawa's truck. The contested issue in the case was whether Grier's conduct was a superseding cause that absolved Imokawa of criminal liability for the death and injury in this case. And that issue was primarily a question of credibility left to the exclusive province of the jury. Because the jury was not properly instructed on the burden of proof, that the State has the burden to prove the absence of a superseding cause beyond a reasonable doubt, there is a reasonable possibility that the jury did not weigh the credibility of Grier's and Imokawa's testimonies based on the appropriate legal standard. Accordingly, the State failed to show that the error in the jury instructions was harmless beyond a reasonable doubt.

IV. SUFFICIENCY OF THE EVIDENCE

Imokawa also argues that there was insufficient evidence to support the jury's verdict because his miscalculation of the space for a lane change was simple negligence and that the State failed to prove that he was operating a motor vehicle with disregard for the safety of others. We disagree.

Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact can 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." *Salinas*, 119 Wn.2d at 201. All reasonable inferences are drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. "Credibility

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determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To prove vehicular homicide and vehicular assault, the State had to prove that Imokawa operated a motor vehicle with disregard for the safety of others and that Imokawa’s driving was the proximate cause of substantial bodily harm or death. RCW 46.61.520, .522. 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 homicide.

CP at 55.

Here, there was sufficient evidence to prove that Imokawa operated his vehicle with disregard for the safety of others because the jury is permitted to consider all the circumstances leading to Imokawa’s lane change to determine whether Imokawa’s misjudgment of space for the lane change was aggravated negligence. The State presented evidence that Imokawa was driving faster than the other vehicles on the road. And Grier testified that Imokawa pulled up dangerously close behind him on two occasions prior to attempting the lane change. Within the entire context of Imokawa’s driving the morning of the collision, there was sufficient evidence for the jury to find that Imokawa operated his vehicle with disregard for the safety of others.

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We hold that the jury instructions in this case violated due process by failing to inform the jury that the State has the burden to prove the absence of a superseding cause beyond a reasonable doubt. Accordingly, we reverse Imokawa's convictions for vehicular homicide and vehicular assault and remand to the trial court for further proceedings consistent with this opinion.


SUTTON, J.

We concur:


MAXA, C.J.


WORSWICK, J.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

COA No. 49995-9-II

v.

DECLARATION OF SERVICE VIA
E-MAIL

DEAN IMOKAWA,
Respondent.

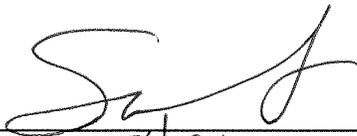
STATE OF WASHINGTON)
 : ss
COUNTY OF CLARK)

On August 21, 2018, I sent an e-mail to the below-named individuals via the Washington State Appellate Courts' Portal, containing an attached copy of the document to which this Declaration is attached.

TO:

Mark Muenster markmuen@ix.netcom.com
Steven Thayer steve@swthayer.com

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



Date: 8/21, 2018.
Place: Vancouver, Washington.

CLARK COUNTY PROSECUTING ATTORNEY

August 21, 2018 - 1:55 PM

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