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SUPREME COURT  
STATE OF WASHINGTON  
1/30/2019 1:16 PM  
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NO. 96217-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Petitioner

vs.

DEAN IMOKAWA

Respondent

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ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY  
The Honorable Scott Collier  
Superior Court No. 15-1-01561-3

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RESPONDENT'S SUPPLEMENTAL  
BRIEF

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## I. STATEMENT OF THE CASE

Dean Imokawa, appellant below and respondent in this court, was charged by an information filed August 18, 2015 with vehicular homicide in violation of RCW 46.61.520, vehicular assault in violation of RCW 46.61.522 and reckless driving in violation of RCW 46.61.500. CP 1. The jury found him not guilty of reckless driving, and not guilty of the reckless driving prongs on both the vehicular assault and vehicular homicide counts. CP 74-78. He was found guilty only on the disregard for safety prong of each count.

In the Court of Appeals, Mr. Imokawa argued that the court erred by not giving his proposed jury instructions which allocated to the state the burden of proof on the issue of superseding cause. He also argued that this burden needed to be placed in the “to convict” instructions as well.

The Court of Appeals agreed with Mr. Imokawa on the former argument and disagreed on the latter. The court held that due process required that the state be given the burden of disproving superseding cause where there was evidence of that fact. The court reversed the conviction and remanded for a new trial. The court also rejected Mr. Imokawa’s argument that there was not sufficient evidence of aggravated negligence to support the jury’s finding of disregard for safety.

The state sought review of the instructional issue. Mr. Imokawa filed a brief in response, opposing the grant of review, and asked for review of the Court of Appeals decision on the sufficiency of the evidence

to convict on the “disregard for safety” prong of the statute. This court granted review of the state’s petition, and invited the parties to file supplemental briefs.

## II. ARGUMENT AND AUTHORITY

- A. The Court of Appeals correctly held that due process of law requires placing the burden of proving the absence of superseding cause on the state where there is evidence to support that contention.

The decision below correctly followed this court’s decision on due process and the allocation of the burden of proof in *State v. W.R.*, 181 Wn. 2d 757, 336 P.3d 1134 (2014). If the defense negates an element of the crime charged, due process requires that the burden of proof on the defense be allocated to the state. Slip Op. at 6, citing *State v. Acosta*, 101 Wn. 2d 612, 683 P.2d 1069 (1984). Based on this court’s analysis of the due process issue in *W.R.*, the Court of Appeals correctly held that a superseding cause negates proximate cause. Slip Op. at 8.

In *W.R.*, this court considered which party had the burden of proof in a rape case where there was evidence of consent. The court observed that

[w]hen a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the defendant. The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist.  
*State v. W.R.*, *supra* at 336 P. 3d 1138.

As the Court of Appeals pointed out, the existence of a superseding cause negates the element of proximate cause in a vehicular homicide or

assault case. Slip Op. at 8. A superseding cause breaks the causal connection between the defendant's actions and the victim's injury. Slip Op. at 8. As the court in *State v. Meekins*, 125 Wn. App. 390, 105 P.3d 420 (2005) observed:

"[a] superseding cause is an act of a third person or other force which by its intervention *prevents the actor from being liable for harm to another* which his antecedent negligence is a substantial factor in bringing about.  
(Emphasis added) 103 P.3d at 425.

Proximate cause and a superseding cause thus cannot co-exist. A<sup>1</sup> superseding cause negates the existence of proximate cause. The Court of Appeals correctly held pursuant to the analysis of *W.R* that due process requires that the state bear the burden of proving the absence of a superseding cause where evidence of one is presented.<sup>1</sup>

B. The Court of Appeals correctly held that the jury instructions in this case did not satisfy the due process requirement of the allocation of the burden of proof.

After reaching the correct conclusion that due process required the allocation of the burden of proof to the state, the Court of Appeals next considered whether the jury instructions satisfied due process. It concluded, properly, that they did not, and rejected the state's argument to the contrary.

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<sup>1</sup> The state's petition in this court did not cite either *W.R* or *Acosta*, and did not challenge in any way the core holding of the Court of Appeals on the due process issue.

The Court of Appeals correctly cited *Acosta* for the proposition that when the state has the burden to prove the absence of a defense, the jury has to be informed “in some unambiguous way” that the state had that burden beyond a reasonable doubt. Slip Op. at 10. While the jury here was given a definition of superseding cause, which was embedded in the long and confusing proximate cause instruction, that instruction did not tell the jury in clear and unambiguous terms that the state had the burden to disprove the existence of a superseding cause. The alternative instruction proposed by the defense made this crystal clear by adding language that spelled out the burden explicitly.

The state argued below and before this court that because the jury was also given an elements instruction (which never mentions the concept of superseding cause), and the typical WPIC instruction on the presumption of innocence and reasonable doubt, the burden of proof on superseding cause would somehow have been apparent to jurors. This argument was rejected by the Court of Appeals and should be rejected by this court as well.

*Acosta* is instructive and controlling on this point. In *Acosta*, the jury was given an instruction on self-defense which plainly told the jury what constituted the lawful use of force. The state argued that since the jury had been instructed it was a “complete defense” to the assault charge if it found that the defendant was acting in self-defense, the jury

instructions were adequate. This argument was rejected by the *Acosta* court:

A reasonable juror could have mistakenly believed that the State need not disprove self-defense, and that the defendant bore some burden of proof on this issue. The trial court's failure to inform the jury of the State's burden was therefore error.

101 Wn. 2d at 623.

Since in *Acosta* a separate instruction on self-defense did not satisfy the due process requirement to notify the jury that the burden of proof on that issue fell on the state, the proximate cause/superseding cause instruction here does not satisfy the requirements of due process either.

The state's petition for review recognized the flawed nature of the instructions that were given on superseding cause, noting that they were "problematic", "inartful" and "clunky". Yet, the state claimed that these same deeply flawed instructions would still somehow manage to clearly convey which party has the burden of proof on the issue of superseding cause. Obviously, both contentions cannot be true. The instructions were defective because the burden of proof is *not* clearly and unambiguously stated, as *Acosta* and the due process clause require.

Nor was the panel of the Court of Appeals in this case the first to point out how confusing these instructions would be for the average juror. Other Washington courts have recognized the logical difficulties involved in the pattern instructions on proximate cause and superseding cause. In

*State v. Souther*, 100 Wn. App. 701, 998 P.2d 350 (2000), the defense proposed an alternative instruction to the pattern instruction given by the court, which made it clear that it was a defense to a charge of vehicular homicide if the death was caused by a superseding, intervening event. Souther pointed out that in the pattern instruction, the language concerning the effect of a superseding cause is buried in between language that says that the acts of another are *not* a defense and language suggesting what is *not* a superseding cause. 998 P. 2d at 354-55. The *Souther* court agreed that the language was confusing and that the language of the instruction was self-contradictory. 998 P.2d at 355. However, the court found that any error which resulted was harmless beyond a reasonable doubt under the facts of that case. Souther's proposed intervening cause was either that the adverse driver was speeding or had misled him regarding his intentions to turn. The court found that at most these were at most concurring causes, not superseding causes, and therefore were not a defense to the charge.

In *State v. Meekins*, 125 Wn. App. 390, 105 P.3d 420 (2005), the defendant was charged with vehicular homicide as a result of a collision between his vehicle and an oncoming motorcycle. The defense contended that the motorcycle's failure to have its headlight on caused the defendant not to see it coming and to turn left in front of it. The court gave an instruction on contributory negligence, but also an instruction which flatly stated that contributory negligence was not a defense to the charge of vehicular homicide. The court did not instruct the jury that contributory

negligence might be material on the issue of whether the defendant's negligence was a proximate cause of the motorcyclist's death. The court held that by precluding the jury from considering whether the failure to have a light was either a superseding cause or the sole cause of the death, the instructions on contributory negligence were improper and required reversal of the conviction.

While *Meekins* did not raise the due process issue presented by this case, it is an illustration of the difficulties juries may have with the issue of proximate cause and other causes than may contribute to the injuries in a collision and demonstrates why an instruction which places the burden on the state to disprove a superseding cause is absolutely necessary. As in *Meekins*, in the present case the jury was never told in an unambiguous manner that the state had to disprove that Grier's conduct was a superseding cause of the collision between Mr. Imokawa's GMC and Ms. Dallum's Kia SUV. The instructions that were given in this case on proximate cause and its relationship to a superseding cause have the same flaws that concerned both the *Meekins* and *Souther* courts. The Court of Appeals decision below recognized these flaws in coming to its conclusion that "there is a distinct possibility that the burden of proof was unclear to the jury...." Slip Op. at 11.

Jury instructions must more than adequately convey the law to jurors. The relevant legal standard must be "manifestly apparent to the average juror." *State v. LeFaber*, 128 Wn. 2d 896, 900, 913 P.2d 369

(1996); *State v. Allery*, 101 Wn. 2d 591, 595, 682 P.2d 312 (1984). The pattern instructions on proximate cause/superseding cause given by the trial court in this case failed miserably at conveying which party has the burden of proof on superseding cause. The relevant legal standard was not made “manifestly apparent to the average juror.” On the other hand, the instructions proposed by the defense would have clarified that the state bore the burden beyond a reasonable doubt. This court should affirm the Court of Appeals holding that the instructions given in this case did not make the burden of proof unambiguous to the average juror and remand for a new trial.<sup>2</sup>

- C. The Court of Appeals correctly held that the instructional error was not harmless in this case.

The state argued below, and in its petition to this court, that the due process instructional flaw in the instructions in this case was harmless.

The Court of Appeals rejected this argument and so should this court.

The Court of Appeals cited *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002), which appears to apply a “contribution” test as the test of constitutional harmless error in an instruction case. The *Brown* case relied on *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) which also used a “contribution” test for harmless error involving a constitutional issue. The *Neder* opinion set forth the following test for

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<sup>2</sup> Although the Court of Appeals rejected the idea that the “to convict” instruction could include the absence of superseding cause as an element, this would be the clearest way to convey which party had the burden of proof.

determining whether a constitutional error is harmless: “[W]hether it appears `beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Neder*, 527 U.S. at 15, 119 S.Ct. 1827 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. *Neder*, 527 U.S. at 18, 119 S.Ct. 1827.

As the decision below noted, there was evidence to support the existence of superseding cause because of Mr. Grier’s conduct. So the element of proximate cause was not supported by “uncontroverted evidence.” Because the jury was not instructed on the burden of proof on superseding cause, there was a reasonable possibility that the jury did not view this contested evidence in the proper constitutional framework. As this court pointed out in *Personal Restraint of Lile*, 100 Wn. 2d 224, 229, 668 P.2d 581 (1983) where the evidence regarding a defense is contested, “correctly placing the burden of proof... was vital.” It cannot be said beyond a reasonable doubt that the defective instructions did not contribute to the guilty verdicts. The error is not harmless under the contribution test used by the Court of Appeals.<sup>3</sup>

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<sup>3</sup> Justice Gonzales’s dissent in the recent case of *State v. Chacon*, No. 995194-2, (Slip Op. Dec. 27, 2018) noted that:

The state's petition also suggested that the argument of counsel would sufficiently clarify the burden of proof for the jury. Petition at 18. This argument fails. Jurors are instructed that they must "disregard any remark, statement or argument [of counsel] that is not supported by the evidence or the law in [the] instructions." WPIC 1.02. The trial court gave no clear instruction on which party bore the burden of proof, and thus the jury was free to reject any argument by defense counsel to the contrary. Indeed, in *Acosta*, the court noted that the "defense attorney is only required to argue to the jury that the facts fit the law; the attorney should not have to convince the jury what the law is." *Acosta* at 622. The absence of an instruction allocating the burden of proof contributed to the verdicts in this case, and the error is not harmless beyond a reasonable doubt.

The other prevailing test for harmless error in the context of a constitutional error is the "overwhelming evidence" test. In *State v.*

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Empirical research and the national trend of robust jury instructions highlight the need to instruct juries on the state's burden of proof and the defendant's lack of burden.

A study of post-verdict jurors found that nearly one third of the jurors believed as long as the state presents some evidence, "it becomes the defendant's responsibility to persuade the jury of his [or her] innocence. Lawrence Mr. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt about Reasonable Doubt*, 78 Tex. L. Rev. 105, 119-20 (1999) citing Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 Land and Water L. Rev. 59 (1998).

Without an instruction which unambiguously and clearly placed the burden of proof on the state to disprove superseding cause, the jury in the present case may have believed Mr. Imokawa had to carry the burden on this issue as well.

*Acosta, supra*, the court had to determine whether the due process error there, which is the same error present in this case, was harmless or not. The court determined it did not need to choose between the “overwhelming evidence” test or the “contribution” test, finding the error was not harmless under either version. *Acosta* at 624-625.

In the present case, the record demonstrates that there was *not* overwhelming evidence of guilt. If there had been, the jury would not have found Mr. Imokawa “not guilty” on the substantive charge of reckless driving, and “not guilty” on the recklessness prong of the vehicular assault and homicide statutes.

As argued in Mr. Imokawa’s response to the state’s petition for review at pages 11-13, there was also not overwhelming evidence of aggravated negligence (disregard for safety) on Mr. Imokawa’s part in passing Mr. Grier’s vehicle. Consequently, the instructional error in failing to allocate the burden of proof to the state is not harmless under either of the prevailing tests for harmless error involving a constitutional issue.

### III. CONCLUSION

Mr. Imokawa’s defense to the charge of vehicular homicide and vehicular assault rested chiefly<sup>4</sup> on the concept of superseding cause. Because the existence of a superseding cause negates proximate cause, due process of law required the state to assume the burden to disprove superseding cause when the defense presents evidence of this issue. Under

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<sup>4</sup> He also argued at trial that he was not reckless, nor criminally negligent.

*Acosta*, the jury must be told in an unambiguous way that the state bears the burden of proof on any issue where the existence of the defense negates an element of the state's case. The Court of Appeals correctly held that the instructions given in this case failed to do so, and were thus constitutionally defective. This court should affirm the Court of Appeals, and remand to the trial court for a new trial.

Dated this 30<sup>th</sup> day of January, 2019

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**January 30, 2019 - 1:16 PM**

**Transmittal Information**

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**Appellate Court Case Title:** State of Washington v. Dean Masao Imokawa  
**Superior Court Case Number:** 15-1-01561-3

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