

65008-4

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NO. 65008-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

YEVGENIY I. MIKHAYLOV,

Appellant.

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BRIEF OF RESPONDENT

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I. ISSUES

1. A defendant passed four cars at a high rate of speed as a fifth vehicle (the lead vehicle) made a left turn. The defendant struck the turning vehicle and was prosecuted for vehicular assault premised upon reckless driving. A rule of the road requires a left-turning vehicle to yield the right of way to “any vehicle approaching from the opposite direction.” The trial court declined to so instruct the jury, since the uncontroverted testimony was that there was no vehicle approaching from the opposite direction. Did it abuse its discretion in doing so?

II. STATEMENT OF THE CASE

A. DEFENDANT’S VEHICULAR ASSAULT UPON JENNIFER JUNE IN TRYING TO PASS FIVE CARS.

July 13, 2008 was a clear and sunny Sunday. 2 RP 3, 26, 65, 102.¹ Jennifer June was up from Tacoma and visiting a friend on the Tulalip Reservation. She decided to take a leisurely drive by herself along Marine View Drive in her Subaru Forester. 2 RP 3-5, 145. She was going slower than other traffic. 2 RP 4-5, 16, 65-67.

¹ “1 RP” is to a partial verbatim record of trial that includes only in limine motions, the testimony of one witness (Tom Gish) and the colloquy on instructions. “2 RP” refers to a “supplemental report of proceedings” that includes the remaining eight witnesses’ testimony and closing argument.

She had four cars behind her, driven by Lester Hersh (2 RP 64-70), Matthew Tole (2 RP 26-38), James Spratley (2 RP 38-50) and Tom Gish (1 RP 18-47), in roughly that order. She decided she had driven along far enough and signaled to turn left at the next intersection, which was Sunny Shores Road. 2 RP 5-6, 15-16. Three of the drivers behind her saw her signaling and slowed down too. 2 RP 66 (Hersh), 2 RP 27-28, 38 (Tole), 2 RP 39 (Spratley). (Gish didn't see the signal but saw Ms. June's car turning left and also slowed down. 1 RP 46-47.) It was a clear unobstructed turn, and there was no oncoming traffic. 1 RP 26; 2 RP 5, 37-38, 66.

Tole, Spratley and Gish heard a car approaching from their rear at a high rate of speed. 1 RP 21-22; 2 RP 28-29, 40-41. (Hersh, directly behind the victim car, never even saw it coming. 2 RP 67, 70.) The 18-year-old defendant, driving his father's BMW, thought traffic was going too slow and decided to pass all the other cars. 2 RP 57, 89. The other drivers at the time thought he was traveling upwards of 70 to 80 mph. 1 RP 22, 44; 2 RP 29, 34, 41, 47, 49. Spratley recalled his truck actually shook as the BMW sped past. 2 RP 41.

Ms. June's Subaru was in the process of turning left, her car perpendicular to the very-fast-approaching defendant. He slammed

broadside into the rear half of her car, collapsing the back end, pushing her left tire over towards the right rear tire, bending the axle, and pushing the car 110 feet while spinning it around. The defendant's own car traveled 195 feet, more or less in a straight line, and ended up in a ditch, with major front-end damage. 1 RP 22-24, 26, 42; 2 RP 30, 41-42, 45, 53-55, 68, 85-86, 90-91, 103, 112-14, 120, 125, 134-35. An accident reconstructionist concluded the defendant had been traveling at 66 mph, while Ms. June was going 4 mph as she turned. 2 RP 140. It appeared the defendant had applied his brakes only at the last minute. 2 RP 136-37. The speed limit on the road is 50 mph. 2 RP 144.

Asked if they would have attempted such a maneuver as the defendant had done – trying to pass 4-5 cars at a high rate of speed – each of the other drivers said no. 2 RP 68-69 (Hersh), 2 RP 32 (Tole), 2 RP 45 (Spratley); 1 RP 26 (Gish).

Ms. June sustained a fractured rib; a bruised, bleeding liver; and a transverse process fracture (that is, a fracture of one of the spiny protrusions of the vertebrae) in her lower back. Her most lasting injury turned out to be a fractured collarbone and a separation of the acromion from the clavicle, or acromioclavicular (“AC”) joint separation. This resulted in a lump and one shoulder

being permanently lower than the other, a lifelong deformity. Both the shoulder and lower back injuries continue to cause pain, such as when Ms. June sits for a long period, or when she tries to sweep or rake leaves. 2 RP 9-11, 74-78.

The defendant did not testify. 1 RP 50; 2 RP 156.

The jury convicted the defendant of vehicular assault as charged. 1 CP 19. The defendant was sentenced within the standard range. 2 CP 51-61. This appeal followed. 1 CP 1-13.

B. INSTRUCTIONS.

The State offered a packet of standard pattern instructions. 1 CP 28-44. The defendant proposed three non-pattern instructions based on the “rules of the road” at RCW 46.61. 1 CP 21-27; 1 RP 51. The trial court put together a combined instruction, drawing on some of the defendant’s proposed instructions and on other rules of the road in RCW 46.61 it deemed applicable. 1 RP 51. The prosecutor objected, asking that, if given, that at least the “due care” rule at 46.61.445 be added as well. 1 RP 52-53. The trial court agreed to add a “due care” instruction. 1 RP 54, 58, 61. A combined instruction on rules of the road, listed as Instruction #11 and as drafted by the trial court, went to the jury. 2 CP 75-76.

The defense took exception to one of its proposed instructions not being included in Instruction #11. 1 RP 64. That instruction, mirroring the language of RCW 46.61.185, read as follows:

The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

1 CP 24; RCW 46.61.185. The trial did not think it applied:

THE COURT: Well, the 46.61.185 instruction, a vehicle turns left, deals with a vehicle coming from the opposite direction and is inapplicable to the facts of this case.

1 RP 55. The defense argued there has to be some rule governing left-turners: they don't enjoy a blanket "left-of-way," but must yield.

1 RP 56. The trial court responded that was the case "to any vehicle approaching in the opposite direction." Id. Defense counsel argued the statute applied to vehicles approaching from *behind* as well. 1 RP 56-57. The trial court was not persuaded:

THE COURT: Well, 46.61.185 is inapplicable to the facts of this case. I'm not going to give instructions dealing with oncoming vehicles because there is no oncoming vehicle in this case.

1 RP 58. On appeal, the defendant alleges the trial court abused its discretion in not giving this proposed instruction. BOA 2-5.

III. ARGUMENT

A. VEHICULAR ASSAULT GENERALLY; THREE POSSIBLE WAYS OF COMMITTING.

Vehicular assault is committed when a person causes substantial bodily harm to another by driving 1) in a reckless manner, 2) while under the influence of intoxicating liquor or any drug, or 3) with disregard for the safety of others. RCW 46.61.522 as amended by Laws of 2001, ch. 300, § 1; see generally Fine & Ende, 13B Washington Practice: Criminal Law §§ 2701, 2705 at 162, 166 (2d ed. 1998) and 2009-10 Pocket Part thereto at 99, 101. Vehicular homicide has the same three alternate ways of committing the crime. Compare RCW 46.61.520. The intoxication and recklessness prongs merit greater punishment than the disregard-for-safety prong. Compare Sentencing Guidelines Comm'n, Adult Sentencing Manual III-234 (2008) with Id. at III-235.

The defendant was charged under the recklessness prong, 1 CP 45-46, and the jury was so instructed. 2 CP 70-72.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO GIVE AN INAPPLICABLE INSTRUCTION.

Generally, a party is entitled to instructions supporting his case theory if substantial evidence exists to support the theory. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009); State

v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). “Parties are entitled to [jury] instructions that, when taken as a whole, properly instruct the jury on the applicable law, *are not misleading*, and allow each party the opportunity to argue their theory of the case.” State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003) (emphasis added). A defendant is not entitled to an instruction that inaccurately states the law. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). The defendant concedes a trial court’s refusal to give a proposed instruction is reviewed for abuse of discretion. BOA 2, citing State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336 (1998).

The defendant argues the jury should have been instructed on a turning driver’s duty to yield to “any vehicle approaching from the opposite direction” per RCW 46.61.185. BOA 2-5 (repeating argument below at 1 RP 51-58, 64). But here, testimony was uncontroverted that there was *no oncoming traffic approaching from the opposite direction*. 1 RP 26; 2 RP 5, 37-38, 66. Moreover, since no error was assigned to them, these facts are verities on appeal. RAP 10.3(g); State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Thus, the proposed instruction was not supported by substantial evidence – or, indeed, *any* evidence – in the record.

See State v. Powell, 150 Wn. App. at 154; State v. Theroff, 95 Wn.2d at 389. It is hardly an abuse of discretion, then, to decline to give an instruction unsupported by the evidence at trial. Id. And to give it anyway would have been misleading, and an inaccurate statement of the law (as if somehow applying to these facts). See State v. Redmond, 150 Wn.2d at 493; State v. Ager, 128 Wn.2d at 93.

The defendant agrees that the trial court's conclusion "at first glance appears to be correct," but then argues that upon closer reading, the last ten words of the statute actually comprise a completely separate clause, somehow also referencing "oncoming" vehicles approaching from behind, that is, traveling in the same direction. BOA 4.

The statute reads as follows:

The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction *which is within the intersection or so close thereto as to constitute an immediate hazard.*

RCW 46.61.185 (emphasis added). A straightforward reading of its language confirms that the clause beginning with "which" and concluding with "hazard" refers to the antecedent phrase "any

vehicle approaching from the opposite direction.” There is no basis for concluding that the last ten words (beginning with “or”) actually refer to unspecified cars approaching from the *same direction* as well. “Plain words do not require construction.” City of Kent v. Jenkins, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000), quoting State v. McCraw, 127 Wn.2d 281, 288, 898 P.2d 838 (1995). And this language is clear and plain. The defendant argues that since another interpretation is possible, the court should apply the rule of lenity. But a statute is not rendered ambiguous merely because different interpretations are conceivable (assuming different interpretations are even conceivable here). State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996), review denied, 131 Wn.2d 1020 (1997). And when a statute is clear and unambiguous, a court may not engage in statutory construction or even consider the rule of lenity. State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996); State v. Hahn, 83 Wn. App. at 834.

The defendant argues that restricting the duty to yield only to vehicles approaching from the opposite direction would mean that left-turning drivers could recklessly pull out in front of an oncoming passing vehicle, approaching from the same direction, with impunity. This argument presupposes that an element of reckless

driving or vehicular assault requires a defendant to have violated an infraction. This is not the case. RCW 46.61.522; WPIC 90.05 (definition of "reckless"); WPIC 91.02 (elements). One can still drive recklessly, and commit a vehicular assault, in a situation where one did not have a defined duty to yield. Id. In fact, one can commit reckless driving even in a situation where one *has* the right of way, for "possession of the right of way on the part of the driver of an automobile never excuses heedless or reckless conduct." Webber v. Park Auto Transp. Co., 138 Wash. 325, 330, 244 P. 718 (1926).

Moreover, the cases interpreting RCW 46.61.185 deal with vehicles approaching from the *opposite* direction. E.g., Mossman v. Rowley, 154 Wn. App. 735, 740-41, 229 P.3d 812 (2009), review denied, 169 Wn.2d 1018 (2010) (upholding summary judgment in favor of northbound driver who struck southbound driver as latter turned left; turning driver still has duty to yield to oncoming vehicle even if latter is speeding); Mendelsohn v. Anderson, 26 Wn. App. 933, 937, 14 P.2d 693 (1980) (southbound left-turning car struck by northbound car; reiterating general rule that turning driver must yield right of way to approaching vehicle); Bohnsack v. Kirkham, 72 Wn.2d 183, 187, 190, 432 P.2d 554 (1967) (left-turning driver who fails to yield right of way to driver approaching from opposite

direction can be negligent per se); Erickson v. Kongsli, 40 Wn.2d 79, 80-81, 240 P.2d 1209 (1952) (respondent turned in front of oncoming vehicle; roadside building owner not within protected class, therefore, driver not negligent per se as to building owner); Webber v. Park Auto Transp. Corp., 138 Wash. at 330-31 (driver turned left in front of bus approaching from opposite direction; held, verdict in favor of plaintiffs supported by sufficient evidence, but reversed for failure to give a “due care” instruction).

In Brown, the Court of Appeals distinguished cases dealing with *following* or *passing* vehicles (as here) as inapplicable to RCW 46.61.185, which deals only with *oncoming* vehicles. State v. Brown, 119 Wn. App. 473, 477, 81 P.3d 916 (2003) (distinguishing Hurst v. Struthers, 1 Wn. App. 935, 465 P.2d 416 (1970) and Niven v. MacDonald, 72 Wn.2d 93, 431 P.2d 724 (1967)).² Brown forecloses the instructional argument made here.

Lastly, the defendant was not, as he claims, deprived of an opportunity to argue his theory of the case. Relying on the court’s instruction no. 11, counsel argued that Mr. Mikhaylov was in a

² In Hurst and Niven, left-turning vehicles were each struck by passing cars approaching from behind; both courts held, on the facts before them, that the turning driver was contributorily negligent. Hurst, 1 Wn. App. at 937-38; Niven, 72 Wn.2d at 94, 98-100.

lawful passing zone; that it is permissible to exceed the speed limit when passing; that the law sets no limit on how many cars one can pass; and that Mr. Mikhaylov was the “favored driver,” and Ms. June the “disfavored” one. 2 RP 162, 165-66, 170. He concluded that this was a regrettable accident caused when Ms. June turned in front of Mr. Mikhaylov, but it was not a felony. Id. This was effective argument, tracked the defense theory of the case, and relied on instructions properly given. The only thing the defendant was denied was an opportunity to argue a statute dealing with the duty to yield vehicles approaching from the *opposite* direction, which did not apply. The trial court did not abuse its discretion in declining to give an instruction based on a statute appropriate and applicable only to very different facts

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on December 22, 2010.

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