

66309-7

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No. 66309-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DENNIS BOGER,

Appellant.

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SUPERIOR COURT OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

DRIVING SLOWLY IN A PRIVATE PARKING LOT
AT NIGHT, EVEN IF INTOXICATED, DOES NOT
PROVE THE DRIVING WAS WILLFULLY OR
WANTONLY IN DISREGARD FOR THE SAFETY OF
OTHERS

The prosecution overstates the facts of the case to portray Boger's driving as inherently dangerous. The testimony does not support the prosecution's depiction of events.

The only person to see Boger driving said Boger was "going really slow," and when he went over a speed bump, "he bumped out." 2RP 110. He kept driving slowly and parked. 2RP 110. This witness suspected Boger had made marks in the parking lot but he had not seen it occur. Even if Boger had spun his tires and made raucous noise, there was no testimony that such actions posed a danger. Driving slowly, even with a bump of tires, cannot be construed as wanton and willful disregard for public safety as required for reckless driving.

The State insists that Boger must have been dangerous because he smelled of alcohol and told the police officer that he had been drinking gallons of wine. But the State omits the context of these remarks. These comments were made in the course of the officer asking Boger many questions from the standardized form.

2RP 19. As the officer methodically went through the form asking the standard questions, Boger was hostile and uncooperative. In response to the arresting officer's question about the type of medications he took for a seizure disorder, Boger responded, "something to the effect of are you stoned, you fucking idiot." 2RP 20. The officer asked Boger what roadway he was on and Boger said, "I don't care." 2RP 21. He responded, "Maple Valley," to the officer's questions about what day of the week it was and what time he started driving. 2RP 22. Shortly thereafter, the officer asked Boger how much he had been drinking and Boger said, "two to three gallons a day." 2RP 22. The prosecution unreasonably claims Boger admitted to drinking two or three gallons of wine, as if this comment when made in a reasonable fashion, when these remarks were only evidence of uncooperativeness, not honest explanations of his actions. In any event, driving slowly in a parking lot while drunk does not establish the wanton or willful disregard of safety required for reckless driving.

There was no evidence Boger drove fast, no evidence any people were in the parking lot when the burning rubber was generated, and no evidence that Boger could not control the car when the burning rubber occurred. As defined by statute, reckless

driving is not the equivalent of driving in a reckless manner. While driving in a reckless manner “means ‘driving in a rash or heedless manner, indifferent to the consequences,’” recklessness is a lesser mental state than that required for the prosecution to prove the offense of reckless driving. State v. Roggenkamp, 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005)

Cases finding it to be reckless to speed and drive drunk do not show the essential elements of reckless driving, because mere recklessness is “a lower mental state” than that required for reckless driving. State v. Hunley, 161 Wn.App. 919, 926, 253 P.3d 448 (2011); see State v. Amurri, 51 Wn.App. 262, 753 P.2d 540 (1988). The heightened mental state necessary to commit reckless driving is the “willful or wanton disregard for the safety of persons or property.” Hunley, 161 Wn.App. at 926; RCW 46.61.500(1).

The State’s claim that a person could drive in a willful or wanton disregard for safety of others by bumping out in a parking lot while drunk does not substitute for proof that it was reasonably shown that Boger did so. The evidence shows only that he drove at a low speed. The State did not introduce evidence that the markings left on the pavement were made by someone moving at a high speed or by someone who was not in control of his car. It did

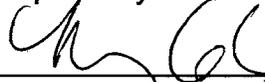
not offer evidence of people whose safety was threatened. The State did not offer sufficient evidence for a reasonable fact-finder to conclude he drove in a willful or wanton disregard for the safety of others.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Boger respectfully requests this Court reverse the reckless driving conviction due to insufficient evidence.

DATED this 28th day of September 2011.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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