IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 60662-0-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
CLEORA A. SWIRTZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: October 6, 2008

PER CURIAM. Evidence that Cleora Swirtz drove faster than 100 miles per hour (m.p.h.) in a 35 m.p.h. zone before the crash that killed her passenger was sufficient to support the jury's finding that she drove recklessly. Considering the nature of the State's evidence and the availability of other defense witnesses, the trial court did not abuse its discretion in finding Swirtz competent to stand trial notwithstanding her amnesia caused by the crash. We affirm Swirtz's conviction of vehicular homicide.

FACTS

On February 27, 2004, Swirtz was driving her parents' 2000 Pontiac Sunfire on a wet roadway just before 10:00 p.m. when it crashed into a tree on the side of the road. Swirtz's passenger, her boyfriend Randall Frank, was killed and Swirtz suffered a severe traumatic brain injury that put her in a coma for more than a month. Swirtz substantially recovered but was left with no memory of the collision or the events leading up to it. The car's computerized "Crash Data Retrieval" (CDR) system indicated the car was traveling at a speed of 104 m.p.h. just prior to striking the tree. There were no indications that either Swirtz

or Frank had consumed any alcohol or controlled substances before the crash. Accident investigators found no sign of any mechanical problem that would have contributed to the crash. Swirtz was aware of the road's speed limit of 35 m.p.h.

The State charged Swirtz with vehicular homicide. Before trial, the court denied Swirtz's motion to find her incompetent because of her inability to recall the events. At trial, the defense argued that the speed leading to the crash was either caused by a malfunction in the car's cruise control system due to electromagnetic interference or Swirtz's mere negligence in placing her foot on the accelerator instead of the brakes. The jury found Swirtz guilty. The trial court imposed an exceptional downward sentence. Swirtz appeals.

ANALYSIS

Swirtz first challenges the sufficiency of the evidence on the necessary element of recklessness, that she drove "in a rash or heedless manner, indifferent to the consequences."[1] Swirtz cites State v. Randhawa[2] for the proposition that recklessness cannot be inferred merely from high speed driving. But the language Swirtz relies on addresses the limitations on inferences that can be drawn from evidence of speed merely 10 to 20 m.p.h. over the limit.

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[1] See 11A Washington Practice, Washington Pattern Jury Instructions: Criminal 90.05 at 65, cmt. (2d ed. Supp. 2005) (citing State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 2005)). The usual standard of review applies. This court views the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in the State's favor and are interpreted against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). Elements of a crime may be established by either direct or circumstantial evidence and circumstantial evidence is no less reliable than direct evidence. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

[2] 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997).

Randhawa expressly reaffirmed our Supreme Court's view that proof of sufficiently excessive speed can permit a rational inference of reckless driving.[3] Here, evidence of Swirtz's speed of almost three times the posted limit on a wet roadway at night provided a rational basis for the jury's finding.

Swirtz nonetheless argues that even if the evidence could support an inference of recklessness, it could not do so beyond a reasonable doubt. She contends that no evidence showed it was any more likely that she was intentionally speeding than that she merely inadvertently depressed the accelerator rather than the brakes, a theory she argued at trial as an alternative to her primary theory of electromagnetic interference.[4] But the State presented evidence that the accelerator would have to be pressed all the way to the floor for 27 seconds to accelerate from a speed of 40 m.p.h. to a speed of 100 m.p.h., which the jury could conclude was highly unlikely to occur accidentally. Moreover, unlike persons overrepresented in groups reporting unwanted acceleration, Swirtz was not elderly, was not too short to fit properly in the driver's seat, and was in a vehicle familiar to her. Viewing the evidence in the light most favorable to the State, the jury had a sufficient basis to reject Swirtz's accidental acceleration theory beyond a reasonable doubt.

Swirtz next contends the trial court erred in finding her competent to stand trial. Trying a legally incompetent defendant violates due process.[5] The

[3] Randhawa, 133 Wn.2d at 78.
[4] Swirtz acknowledges that the State's expert rebuttal evidence provided the jury a reasoned basis for rejecting her primary theory of electromagnetic interference beyond a reasonable doubt.
[5] State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982).

test for incompetency is whether the defendant "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect."[6] A trial court's decision in applying this standard will not be reversed on appeal in the absence of abuse of discretion.[7]

The "ability to assist" aspect of the competency test imposes only a "minimal requirement" that does not necessarily entail the ability to suggest a particular trial strategy or to choose among alternative defenses.[8] Accordingly, while a defendant's ability to relate past events undoubtedly assists the defense attorney, there is no absolute requirement that the defendant be able to do so to be found competent.[9]

Rather, the competency of a defendant with amnesia depends on whether the particular facts of the case show that the defendant's inability to recall events renders the trial unfair. Considerations include the strength of the State's case, the existence of physical evidence linking the defendant to the crime, and the availability of other defense witnesses.[10] In a case where the relevant facts can

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[6] RCW 10.77.010(14); see Wicklund, 96 Wn.2d at 800.
[7] State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144 (1986).
[8] State v. Harris, 114 Wn.2d 419, 428-29, 789 P.2d 60 (1990), habeas corpus granted on other grounds, 853 F.Supp. 1239 (W.D.Wash. 1994), aff'd, 64 F.3d 1432 (9th Cir. 1995) (citing Ortiz, 104 Wn.2d at 483).
[9] See Harris, 114 Wn.2d at 428 (citing Wicklund, 96 Wn.2d at 800).
[10] Harris, 114 Wn.2d at 428-29, 785 P.2d 815 (citing United States ex rel. Parson v. Anderson, 481 F.2d 94 (3d Cir. 1973) and Jonathan M. Purver, Amnesia as Affecting Capacity to Commit Crime or Stand Trial, 46 A.L.R.3d 544 (1972 and Supp. [(1997)]); accord State v. Gilbert, 229 Conn. 228, 640 A.2d 61, 65 (1994) (collecting cases adopting a fact-specific approach); Wilson v. United States, 391 F.2d 460, 462-64 (D.C. Cir. 1968).

be reconstructed from other evidence, the mere fact that a defendant suffers from amnesia will not support a finding of incompetence.[11]

Here, the record does not disclose an abuse of the trial court's discretion. Contrary to Swirtz's attempt to characterize the trial court's ruling by selectively quoting from the oral and written record, the court considered and applied the appropriate test set forth in State v. Harris.[12] We disagree with Swirtz's characterization of the State's evidence as weak. And the trial court correctly anticipated that Swirtz would be able to produce expert testimony to support her theories, and would, moreover, be able to introduce habit evidence regarding her temperament and driving history to further rebut the State's case. We cannot find the trial court abused its discretion in concluding that Swirtz could have a fair trial notwithstanding her amnesia.

Affirmed.

For the court:

Grosse, J.

Appelwick, J.

Becker, J.

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[11] See State v. Swanson, 28 Wn. App. 759, 760-61, 626 P.2d 527 (1981); accord Gilbert, 640 A.2d at 67; Wilson, 391 F.2d at 463-64.

[12] Harris, 114 Wn.2d 419, 428-29, 789 P.2d 60 (1990). In a motion for oral argument, Swirtz argued that publication in this case was warranted to resolve tension between the 1990 Supreme Court decision in Harris and the 1981 Court of Appeals decision in Swanson. But it is already clear that, to the extent there is any inconsistency, Harris controls. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). And the record does not show that the trial court here erred by inappropriately relying on Swanson rather than Harris.