71291-8

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No. 71291-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA CARGILL,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. **The State did not prove beyond a reasonable doubt that Mr. Cargill committed the crime of attempting to elude a pursuing police vehicle.**

Mr. Cargill challenges the sufficiency of the evidence supporting his conviction for attempting to elude a pursuing police vehicle, RCW 46.61.024. He specifically argues that the State did not prove beyond a reasonable doubt that he (1) refused or failed to immediately stop his vehicle and (2) that he drove in a reckless manner in order to elude a pursuing police vehicle. Brief of Appellant at 5-11 (hereafter BOA).

In response, the State relies largely on a Division Three case addressing an eluding conviction under Former RCW 46.61.024, State v. Treat, 109 Wn. App. 419, 426-27, 35 P.3d 1192 (2001). Brief of Respondent at 9-11 (hereafter BOR). The Treat decision, however, does not control Mr. Cargill's case.

In Treat, the defendant was first pursued by Kootenai County sheriff's deputies but was able to evade them in his 1984 Datsun pickup. Treat, 109 Wn. App. at 422. Spokane County deputies later saw the pickup and pulled behind it. Id. When the Datsun sped away,

the Spokane deputy signaled it to stop, but the Datsun did not stop for approximately a quarter-mile. Id. at 423.

After the Datsun stopped, the two Spokane deputies got out of their patrol car and approached the driver. Treat, 109 Wn. App. at 423. The Datsun rolled towards the deputies three or four times and then accelerated rapidly at one of them, who was afraid he would be run over. Id. The Datsun then drove away, but crashed after the deputies shot out its tires. Id. The driver, however, escaped on foot. Id.

Treat argued that the State did not prove that he willfully failed to stop, claiming it was reasonable to wait for a quarter of a mile before pulling over and that his subsequent attempt to get away did not establish eluding because the officer were out of their car. Treat, 109 Wn. App. at 426. The Court of Appeals rejected these arguments. First, there was no evidence that Treat could not stop sooner. Id. at 426-27. And because the eluding statute "does not require that the 'pursuing police vehicle' remain moving at all times." Id. at 427.

In contrast, Mr. Cargill did not argue that he was not eluding because the officer was out of his patrol car. Mr. Cargill stopped in response to the officer's signal to stop, but the officer did not pursue

Mr. Cargill when he drove away. The Treat case thus does not support the State's position.

The State also argues that "Officer Sargent was still following the defendant in an attempt to apprehend him." BOR at 11. This is contrary to the officer's testimony. Officer Sargent made it clear that he was not attempting to apprehend Mr. Cargill as he drove away. 1RP 49-50, 53-54.

Officer Sargent testified that when he broadcast his situation over police radio, his sergeant immediately responded and stated "terminate." 1RP 49. When asked what that meant, the officer explained, "Terminate means to stop a pursuit." 1RP 49. Officer Sargent complied. 1RP 54. He slowly followed Mr. Cargill to observe his direction of travel and so he could assist in the event of an automobile accident; he was no longer attempting to stop Mr. Cargill. 1RP 49-50.

The State goes so far as to argue that Mr. Cargill's trial counsel conceded that the officer was pursuing her client during closing argument. BOR at 10-11. In response to the State's argument that Mr. Cargill created a "path of destruction" as he drove away, defense counsel pointed to the evidence and noted that cars normally pull to the

side of the road in response to emergency lights. 2RP 71, 75. Defense counsel's theme in closing argument, however, was "there was no pursuit." 2RP 72, 74; see 2RP 74-78. This argument was based upon the officer's testimony that he was not pursuing Mr. Cargill. Defense counsel did not concede her client was driving away from a pursuing police vehicle as the State claims.

To convict Mr. Cargill of attempting to elude a pursuing police vehicle, the State had to prove he drove in a reckless manner while attempting to elude a pursuing police vehicle. RCW 46.61.024(1). Here, Mr. Cargill initially pulled over and the police did not pursue him when he drove away. The State therefore did not prove beyond a reasonable doubt that he was attempting to elude a pursuing police vehicle when he drove away. This Court should reject the State's argument and reverse and dismiss Mr. Cargill's conviction for attempting to elude a pursuing police vehicle.

2. **Prosecutorial misconduct in closing argument denied Mr. Cargill his constitutional right to a fair trial.**

A prosecutor's dual role requires him to both prosecute those who appear to have violated the law and to ensure that the accused receives a fair trial. State v. Walker, ___ Wn.2d ___, 2015 WL 276363 at *4 (No. 89830-8, 1/22/15); State v. Monday, 171 Wn.2d 667, 676,

257 P.3d 551 (2011). While the prosecutor may argue reasonable inferences from the evidence, he may not alter or misstate that evidence or argue in a manner that inflames the prejudices of the jury. Walker, 2015 WL at *5; Monday, 171 Wn.2d at 678; State v. Belgarde, 110 Wn.2d 504, 507-10, 755 P.2d 174 (1988). In Mr. Cargill's case, the prosecutor deputy prosecuting attorney exaggerated and misstated the evidence during closing argument, thus prejudicing Mr. Cargill's case. BOA at 12-19. This Court should reject the State's argument that the prosecutor did not commit misconduct.

The State prefaces its argument with a footnote asking this Court not to use the term "prosecutorial misconduct" in its opinion, arguing that the term should only be used for "intention acts, rather than mere trial error." BOR at 12 n.1. According to the prosecutor, a number of appellate courts have concluded that the term "prosecutorial misconduct" should not be used because it is "unfair." Id. This Court need not address an argument presented in a footnote. State v. N.E., 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993); State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993). Moreover, the Washington Supreme Court has already rejected this argument. State v. Ish, 170 Wn.2d 189, 195 n.6, 241 P.3d 389 (2010). "[W]e decline to start

drawing fine lines between error and misconduct." Id. This Court should therefore use the well-accepted terminology.

Mr. Cargill points out several areas where the prosecutor exceeded the scope of proper closing argument by misstating the evidence and appealing to the juror's passions or prejudices. BOA at 13-19. The prosecutor, for example, told the jury that Mr. Cargill knew he had warrants for his arrest and intentionally stopped his car so he could escape when the police officer got out of his patrol car, using his passengers "as a shield." BOA at 15; 2RP 68. The prosecutor asserts this argument was a reasonable inference from the evidence presented at trial. BOR at 15-17. None of the evidence referenced by the State, however, supports an inference that Mr. Cargill was aware of arrest warrants or planned to escape when he stopped in response to the officer's signal to stop.

Moreover, the prosecutor used language designed to appeal to the juror's passion and prejudice in his misinterpretation of the evidence. The prosecutor twice referred to a "path of destruction" caused when Mr. Cargill drove away. 2RP 71, 79. The evidence,

however, shows that no one was injured and no property damaged when cars pulled off the road.[1] 1RP 50, 53.

The Brett Court found the prosecutor in an aggravated murder case did not commit misconduct by arguing (1) a witness should be believed because she was watching her husband "being blown away" by a shotgun, (2) the time it took to reload the shotgun showed a second shot was premeditated, and (3) the victim's privacy was invaded when the defendant entered his home and robbed them. State v. Brett, 126 Wn.2d 136, 179-80, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). The court concluded these remarks were based upon evidence adduced at trial. Id. at 180. The prosecutor does not commit misconduct by arguing that a crime was horrible if it was horrible. State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006).

In the present case, however, the prosecutor exaggerated the evidence, added horrible facts to a case that was not horrible. The prosecutor's statements about using a "baby" as a shield and creating a "path of destruction" were not based upon the evidence presented in Mr. Cargill's case.

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[1] In his Statement of the Case, the prosecutor states that vehicles almost drove into a ditch to avoid an accident with Mr. Cargill. BOR at 4. The State's witness, however, merely testified that the cars drove onto the shoulder of the roadway and were "hugging the ditch." 1RP 47-48.

This was a short trial with only witness. The prosecutor's misstatement of the witness's testimony and use of words that appealed to passion or prejudice occurred throughout his brief closing remarks. 2RP 68-69, 71, 72, 78, 79. This Court should conclude that the prosecutor's misconduct was flagrant and ill-intentioned, reversed Mr. Cargill's conviction, and remand for a new trial. Walker, 2015 WL 276363 at *7, 9.

B. CONCLUSION

Joshua Cargill asks this court to reverse and dismiss his conviction for attempting to elude a pursuing police because the State did not prove beyond a reasonable doubt that he failed to immediately stop his vehicle when signaled, or that he drove in a reckless manner in order to elude a pursing police vehicle, essential elements of the crime.

In the alternative, he asks that his conviction be reversed and remanded for a new trial due to the prosecutor's misconduct in closing argument.

Respectfully submitted this 4th day of February 2015.

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Attorneys for Appellant

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DIVISION I

STATE OF WASHINGTON,	)	
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Respondent,	)	
	)	NO. 71291-8-I
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JOSHUA CARGILL,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF FEBRUARY, 2015, 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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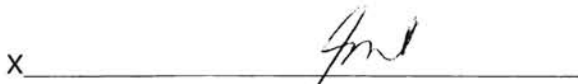
[X]	JOSHUA CARGILL 788283 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326-9723	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON, THIS 4TH DAY OF FEBRUARY, 2015.

X

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