71291-8

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NO. 71291-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA O. CARGILL,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Is there sufficient evidence in the record to support the conviction of one count of attempting to elude a pursuing police vehicle?

2. Was the defendant denied a fair trial by the prosecutor's remarks in closing argument?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

On September 10, 2013, the defendant was charged with one count of attempting to elude a pursuing police vehicle with the added allegation of endangerment by eluding. CP 164. The matter proceeded to jury trial on November 25, 2013. The morning of the first day of trial, prior to the commencement of jury selection, the defendant moved for dismissal of the charge under State v. Knapstead, 107 Wn.2d 346, 729 P.2d 48 (1986). The defendant's motion was denied. 1RP 13. At trial, the jury heard testimony from only two witnesses, Det. Phillips and Officer Sargent, both of the Arlington Police Department. 1RP 28-56; 59. At the close of the state's case, the defendant again moved for dismissal of the charge under State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), the motion was also denied. 1RP 57-58. At the close of evidence, the

defendant requested and was granted to have the jury instructed on the lesser included offense of failure to obey officer. CP 114-115; 127-128. The jury found the defendant guilty as charged. CP 101.

B. TESTIMONY RELEVANT TO SUFFICIENCY OF THE EVIDENCE.

On June 28, 2013, the defendant had two warrants for his arrest. An off-duty Arlington Police detective saw the defendant at the Wal-Mart in Arlington. The detective recognized the defendant by sight. He called an on-duty officer to inform him of the defendant's location and the outstanding warrants. The detective advised his colleague, Officer Sargent, that the defendant was eastbound on 172nd and approximately three vehicles behind a large Winnebago style motor home. 1RP 29-34.

Before arriving in the area, Officer Sargent confirmed the two warrants. Officer Sargent located the defendant driving eastbound on 172nd approaching the intersection with 51st behind the motor home. Officer Sargent was traveling westbound. Officer Sargent could see the defendant driving the vehicle. He saw that the defendant was wearing the distinctive gray fedora. Officer Sargent activated his emergency light bars and executed a u-turn. He pulled in directly behind the defendant and initiated a traffic stop. All of his

lights were flashing red and blue on all sides of his police vehicle. The traffic signal was red for their direction of travel. When the light turned green and the motor home was out of the way, the defendant immediately turned right onto 51st and pulled to the shoulder. 51st is a two-lane roadway that is considered a business road. It has very little shoulder. Officer Sargent described it as having the white fog line, about two feet of grass then ditch on each side. Officer Sargent noted traffic was very congested at the time. 1RP 39-44.

The stop involved warrants; Officer Sargent approached the vehicle as a high-risk situation. He had his sidearm out and pointed down because he could see the defendant had a female passenger next to him in the front seat. The officer stopped at the back of the defendant's vehicle. Officer Sargent testified that he didn't ask the defendant for identification because he was able to recognize the defendant on sight. He called the defendant by name and told him he was under arrest. The defendant said, "no" and revved his engine. Officer Sargent told the defendant not to do it and commanded him to turn off his vehicle and put his hands out the window. The defendant responded, "Why? Are you going to shoot me? There's a kid in the back seat." Officer Sargent looked in the

backseat and saw a small child, approximately 2-3 years old. He immediately holstered his sidearm. 1RP 44-46; 55.

When Officer Sargent had holstered his sidearm, the defendant put his car in gear and drove off at a high speed, crossing into the on-coming lanes. The defendant was weaving in and out of his lane of travel and the on-coming lane in order to move through the highly congested traffic. Vehicles in both directions were forced to split the roadway, almost driving into the ditch to avoid colliding with the defendant. With his emergency lights on, Officer Sargent followed the defendant at a much slower speed. He did not aggressively pursue the defendant because it was too dangerous. Officer Sargent left his emergency lights on and followed the defendant to document his behavior and radio other law enforcement officers. He was able to keep the defendant in sight for about 20 blocks. He saw the defendant swerve into the on-coming lane several times. Officer Sargent estimated there were at least 20 vehicles impacted by the defendant's fleeing from his attempt to stop and arrest him. 1RP 46-51; 54-56.

At the time of the incident, Officer Sargent was wearing his issued police uniform consisting of a full jumpsuit equipped with patches, badges and a duty belt with accoutrement. He was

wearing the same uniform when he testified. He was driving a police Expedition patrol car marked with City of Arlington Police insignia and equipped with mounted lights throughout the entire vehicle, a light bar, and siren. 1RP 37-38.

C. FACTS RELEVANT TO PROSECUTOR'S CLOSING ARGUMENTS.

The prosecutor argued the defendant intended to get away from Officer Sargent from the time he pulled in behind him with his lights flashing. He pointed out the things that blocked or stopped that get away; the motor home, the proximity of the officer's vehicle, the sidearm. He argued the defendant pointed out there was a child in the back of the vehicle to get Officer Sargent to holster his weapon. That in so doing, the defendant was using the child as a shield. As soon as the sidearm was holstered, the defendant put his car in gear and took off. 2RP 68-69.

The prosecutor used the illustrative phrase "a path of destruction" to describe the vehicles forced to drive almost into the ditch to avoid being struck by the defendant in his flight. He pointed out that this driving continued for 20 blocks. 2RP 69.

The prosecutor then argued from the "to convict" instruction pointing out the evidence that applied to each of the 6 elements he

had to prove beyond a reasonable doubt. He emphasized the testimony that showed the defendant did not stop when directed and that he was being pursued by a police vehicle and the evidence supporting the additional allegation of endangerment by abuse. 2RP 69-72.

The prosecutor referenced the child in the backseat five times in his argument. "He [the defendant] informs the officer that there's a child in the car. Uses that child as a shield, a distraction to make the officer holster his firearm." 2RP 69. "[The officer]Going to his supervisor, telling him that there is a 2 or 3 year old child in the back seat of the defendant's car." 2RP 70. "He [the defendant] didn't care about the 20 other cars that he drove off, his adult female passenger or that child in the back of his vehicle." 2RP 71-72. "Not just those 20 other vehicles that were off the road, but specifically that baby that was in the back seat of his car." 2RP 72. In his rebuttal argument, the prosecutor again referenced the child stating, "He knew that Officer Sargent was pursuing him which is why he drove the way he did, recklessly, endangering people, endangering that child." 2RP 80.

The jury was instructed that the prosecutor's remarks were not evidence and to disregard any remark, statement, or argument that is not supported by the evidence. Jury instruction 1 CP 104.

The defendant did not object to any statements made by the prosecutor during either of his closing arguments.

III. ARGUMENT

A. THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE CONVICTION OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

Under the applicable standard of review, there will be sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010); State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the States' evidence. Salinas, 119 Wn.2d at 201; State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284, review denied, 169 Wn.2d 1028 (2010); State v. Porter, 58 Wn. App. 57, 791 P.2d 905 (1990). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against

the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); Salinas at 201; State v. Soderholm, 68 Wn. App. 363, 373, 842 P.2d 1039 (1993).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971). Credibility determinations are for the trier of fact and are not subject to review. State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

The elements the state was required to prove were set forth in the Court's instructions to the jury, instruction number 7. CP 111.

In the case at bar, there is ample evidence upon which a rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt.

The defendant challenge to the sufficiency of the evidence appears to hinge on the state not having shown the three essential elements of attempting to elude occurred in sequence. Appellant's

brief 6. The state had to prove that elements in the following sequence:

First the defendant was given a signal to stop by a uniformed police officer with a vehicle equipped with emergency lights and siren. Id. There is no question that Officer Sargent was a uniformed police officer or that his vehicle was equipped with emergency lights and siren. Also, the facts show that Officer Sargent gave the defendant two separate signals to stop. Initially the signal was given when Officer Sargent activated his emergency lights. The defendant did temporarily stop. Officer Sargent never turned off his emergency lights, so the initial signal to stop was on-going throughout the incident.

Officer Sargent gave the defendant another command to stop when he verbally told him not to do it in response to the defendant revving his engine and to turn off his engine and put his hands out the window.

Second, the driver must willfully fail to immediately stop. In the case at bar, the defendant temporarily stopped, but did not remain stopped. The defendant seems to contend that this satisfied the requirement to immediately bring your vehicle to a stop. It would be defeat the purpose of the statute if a person could

momentarily bring their vehicle to a stop then speed away before the officer concluded the stop. Furthermore, Officer Sargent gave another signal to stop when he told the defendant to turn off his vehicle and put his hands out the window. Officer Sargent was obviously telling the defendant to stop. In a very similar case, sufficient evidence to support a convictions for attempting to elude a pursuing police vehicle was found when a driver stopped briefly for a patrol car's emergency lights but then accelerated at a deputy once the officers were out of their patrol car, then attempted to drive away. State v. Treat, 109 Wn. App. 419, 35 P.3d 1192, 1196-97 (2001).

As in Treat, Officer Sargent gave the defendant verbal commands to stop his vehicle; the defendant disregarded those commands; and, drove away in a reckless manner. The defendant concedes his driving after the temporary stop was reckless. Appellant's brief at 8.

The defendant asserts that after the defendant initially stopped, then drove away, he was no longer being pursued by a police car. Appellant's Brief at 8. This is contradicted by the defendant's argument at trial. In her closing argument, the defendant's trial attorney, in an attempt to explain the vehicles that

had to drive almost into the ditch said, "Officer Sargent testified that there were cars moving to the side, but he also testified he was following the vehicle with his emergency lights activated. Isn't it normal for someone to see an emergency vehicle coming at them to pull over to the side of the road?" 3RP 75.

"[W]hile the eluding statute requires that the defendant elude a "pursuing police vehicle," it does not require that the police vehicle remain moving at all times. RCW 46.61.024. Thus, [the defendant] was attempting to elude a pursuing police vehicle even though it had stopped and the deputies got out." Treat, 109 Wn. App. at 427.

The evidence in this case is clear that Officer Sargent was still following the defendant in an attempt to apprehend him. A Police officer does not have to engage in the same aggressive, reckless driving as the defendant to be pursuing a fleeing vehicle. In the case at bar, Officer Sargent followed the defendant at a slower, safer speed down the narrow two lane road. While he was able to keep the defendant in sight, he was also using his radio to try to apprehend him by advising his fellow law enforcement officers of the defendant's movements and location. He had his emergency lights on as a clear signal to the defendant to stop.

B. THE PROSECUTOR APPROPRIATELY ARGUED THE FACTS AND LAW OF THIS CASE AND THEREBY THE DEFENDANT RECEIVED A FAIR TRIAL.

In a prosecutorial error[1] claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653, 662 (2012). If the defendant objected at trial, the defendant must show that the prosecutor's error resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. But if, as here, the defendant failed to object at trial, the defendant is deemed to have waived any error, unless the prosecutor's conduct was so

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[1] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.,* State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. In other words, Since the defendant in the case at bar did not object to any of the alleged improper arguments at trial, he must show that: (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the conduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. Emery, 174 Wn.2d at 760-761. Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747, 785 (1994).

Instead of examining improper conduct in isolation, the court determines the effect of any improper conduct by examining "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551, 555 (2011).

The State is afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. State v. Anderson, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009). "In this case, the prosecutor was making arguments based on evidence adduced at trial. [the defendant] has

failed to meet his burden to establish that these comments were improper or that there is a substantial likelihood the jury verdict was affected thereby." State v. Brett, 126 Wn.2d 136, 180, 892 P.2d 29, 52 (1995), cert. denied, 516 U.S. 1121 (1996).

1. The Prosecutor Argued Reasonable Inferences From The Evidence Admitted At Trial And Thereby Did Not Deny The Defendant His Right To A Fair Trial.

In the case at bar, the defendant objects to four points in the prosecutor's argument: 1) that the prosecutor argued the defendant intended to escape from the officer from the moment the officer pulled in behind him; 2) that the prosecutor argued the defendant used the small child in his car as a shield; 3) the prosecutor's use of the descriptive phrase 'path of destruction' to describe the vehicles pulled to the ditches on either side of the roadway to avoid colliding with the fleeing defendant; and 4) that the prosecutor referred to the small child in the backseat of the defendant's car as a baby. The defendant complains that the prosecutor argued facts that were not in evidence and by doing so appealed to the passions and prejudices of the jury. Brief of Appellant at 13-14. The defendant did not object during the state's closing or rebuttal closing arguments. The defendant now bears the burden of showing first

that the comments were improper and second that no curative instruction could have obviated any prejudicial effect on the jury.

The prosecutor's arguments were proper; they did not appeal to the jurors' passions and prejudices. They were reasonably based on the facts in this case and necessary to respond to the relatively unique circumstances presented by the defendant's behavior.

The prosecutor argued the defendant intended to escape from Officer Sargent from the time the officer activated his emergency lights. The defendant complains that this argument is unnecessary and designed to make the defendant look like a dangerous criminal. Brief of Appellant at 15. However, in the unique facts of this case, the state needed to address the defendant's claim that he was not eluding because he had stopped briefly before driving away. The prosecutor's argument goes to prove the defendant knowingly eluded the officer and the momentary stop was just a step in the process of the attempt to elude the officer. This argument was based on a reasonable inference from the testimony at trial. Although the defendant pulled around the corner and stopped, he left his vehicle running; he gunned the engine when the officer first got out of his car with his

sidearm drawn; he indicated 'no' when the officer told him he was under arrest; and, when told to turn off his engine, the defendant responded, Why, then asked the officer if he was going shoot him and pointed out there was a child in the backseat. The defendant didn't speed off until the point the officer holstered his sidearm in response to seeing there was a small child in the backseat.[2] The argument that the defendant had intended to get away from Officer Sargent from the time he pulled in behind him with his lights flashing could reasonably be inferred from the evidence presented at trial.

The defendant also takes exception with the prosecutor's illustrative phrase "path of destruction" used to describe the roadway after the defendant had sped down it causing cars in both direction to dive to the side of the road to avoid colliding with him. The description at trial was a roadway with more than 20 cars pulled almost into the ditch after close call encounters often in a head-on circumstance with the defendant. The testimony also

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[2] In his brief, the defendant argues "the record shows that Mr. Cargill did not drive away until after the officer pulled his weapon and informed him he was under arrest." This argument is not supported by the record. The record shows the defendant drove away after the officer holstered his weapon in response to the presence of the small child. 1RP 46.

indicated the defendant was traveling at a high rate of speed when these vehicles were forced to get out of his way. The descriptive phrase is based on the evidence admitted at trial.

The defendant also complains of the prosecutor describing the defendant using the presence of the small child in the backseat of his vehicle as a shield. This argument is also a description of the defendant's actions. The defendant asked the officer, "Why [should he turn off his engine and put his hands out the window]? Are you going to shoot me? There's a kid in the back seat." This results in the officer re-holstering his sidearm and the defendant speeding away. A reasonable inference from this evidence is the defendant intended to use the presence of the child in his car to shield him from police action.

Finally, the defendant complains of the prosecutor using the term baby when referring to a 2-3 year old child when arguing for the endangerment allegation. Whether or not the term baby appropriately describes a 2 to 3 year old child is a matter of personal interpretation. Regardless, the jury was aware of the approximate age of the child based on the witness testimony and the prosecutor had referenced the estimated age just prior to referring to the child as a baby. And, the defendant fails to show

how the term baby would be more prejudicial to a jury than arguing the defendant endangered a 2 to 3 year old child. The testimony in this case was that there was a small child, 2-3 years old in the backseat of the defendant's vehicle as he sped off in the on-coming lanes causing vehicle to have to take evasive action to avoid collision. A reasonable inference from the evidence produced at trial was that the defendant did endanger everyone on the road that day, including the small child in his backseat.

The defendant argues that all of these arguments were improper appeals to the prejudices and passions of the jurors. "Arguments intended to "incite feelings of fear, anger, and a desire for revenge" that are "irrelevant, irrational, and inflammatory are improper appeals to passion or prejudice." In re Cross, 180 Wn.2d 664, 724, 327 P.3d 660, 694 (2014). "But, a prosecutor is not muted because the acts committed arouse natural indignation." State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158, review denied 175 Wn.2d 1025 (2012).

In the case at bar, the prosecutor's arguments did not improperly appeal to the jurors' passions or prejudices. They were reasonable inferences from the facts that were relevant, rational to the case at hand. The arguments at question were not irrelevant,

irrational or inflammatory but were based solely on the facts in evidence. Unlike the Pierce case relied upon by the defendant, the prosecutor here did not make up imaginary conversations, struggles or pleas for mercy. Nor did the prosecutor ask the jurors to put themselves in the place of the adult passenger, other motorist or the child in the backseat. Pierce, 169 Wn. App. 533.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on October 24, 2014.

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