71938-6

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COA No. 71938-6-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDREW FORD SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SKAGIT COUNTY

The Honorable Michael E. Rickert

APPELLANT'S OPENING BRIEF

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1. The trial court violated Mr. Smith's constitutional right to Due Process when, in the absence of sufficient evidence to establish all the elements of the crime beyond a reasonable doubt, it entered a judgment of conviction on the charge of Attempting to Elude a Pursuing Police Vehicle.

2. Evidentiary error requires reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove Eluding, the State was required to prove that Mr. Smith drove recklessly – i.e., in a rash or heedless manner – after being given a signal to stop. Where the evidence, even in the light most favorable to the State, fails to show reckless driving after the Deputy signaled Mr. Smith with his lights, must the Eluding conviction be reversed and the charge dismissed with prejudice?

2. The trial court erroneously admitted lay and police officer testimony that Mr. Smith was "under the influence," an element of Driving Under the Influence under RCW 46.61.502. A lay witness also violated the trial court's order *in limine* by telling the jury that Mr. Smith knew his wife because they had been in Alcoholics Anonymous. Although the jury acquitted Mr. Smith of DUI, the two charges were related, and the improper evidence of driving under

the influence likely affected the outcome of the State's weakly supported Eluding case. Is reversal required?

C. STATEMENT OF THE CASE

Andrew Smith was charged with Attempting to Elude a Pursuing Police Vehicle, and Driving Under the Influence, based on events on March 18, 2012. CP 1-2 (information), CP 3-5 (affidavit of probable cause); 5/12/14RP at 52-68. According to Sedro Woolley resident Brian Gaylord, Mr. Smith drove his Ford Explorer up to the Gaylords' home and behaved strangely. He told Mr. Gaylord that he was going to urinate in Gaylord's goat pen. 5/12/14RP at 56-57. Mr. Smith was not walking straight as he used his cane to move about the property. 5/12/14RP at 58-59. When told that he needed to leave, Mr. Smith re-entered his Explorer and, after initially going forward, he backed up down the length of the Gaylords' 100-yard driveway. 5/12/14RP at 55, 60-61.

Mr. Gaylord's daughter, Bree, called 911 to report this conduct. 5/12/14RP at 71, 74-75. Bree noted that Mr. Smith's limp was more prominent than usual. 5/12/14RP at 74-75. She also explained that Mr. Smith had been having a relationship with her

mother, until she died recently.[1] 5/12/14RP at 73. Mr. Smith normally acted strangely, including by mumbling to himself. 5/12/14RP at 77.[2]

Skagit County Sheriff's Deputy Christopher Dodds took the dispatch based on the 911 call and looked for Mr. Smith's vehicle in the area. He located the Ford Explorer driving westbound on State Route 520. 5/12/14RP at 80-83. See Part D., infra.

After being taken into custody for alleged Eluding and DUI, Mr. Smith did not do any field test, Drug Recognition Expert evaluation, or BAC test. 5/13/14RP at 48-50, 77 (testimony of Deputy John Hendrickson). Deputy Hendrickson detected no odor of intoxicants about Mr. Smith. 5/13/14RP at 46-47. The deputy did state that he believed the appearance of Mr. Smith's pupils were indicative of a central nervous system depressant such as alcohol or something, but he admitted that Mr. Smith's eyes were not watery or blood shot, and admitted there was no actual physical evidence that Smith was intoxicated. 5/13/14RP at 64-66, 82-83.

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[1] Mr. Gaylord admitted that while Mr. Smith was on the property, he may have threatened to shoot him with his gun. 5/12/14RP at 68.

[2] Prior to trial, over the course of a number of months, Mr. Gaylord was evaluated for competence to stand trial, was deemed incompetent, and was restored to prosecutability by administration of drugs at Western State Hospital. 2/1/13RP at 2-6; 10/24/13RP at 5; 11/14/13RP at 6-8; CP 6-8, 9-11, 12-14, 15-17, 18-20, 21-22.

The jury found Mr. Smith guilty of Eluding but acquitted him on the DUI charge. 5/13/14RP at 154; CP 48, 49. Mr. Smith was subsequently sentenced to a standard range term. 5/15/14RP at 162-63. CP 51-61. He appeals. CP 62.

D. ARGUMENT

1. THE STATE FAILED TO PROVE EVERY ELEMENT OF ATTEMPTING TO ELUDE A POLICE VEHICLE.

a. The State must prove every essential element of the crime of Eluding beyond a reasonable doubt, including reckless driving following a signal to stop, in order to prove that Mr. Smith attempted to elude the Deputies.

An accused may only be convicted if the State proves every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Drum, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010); U.S. Const. amends 5, 14.

(i). There must be reckless driving <u>after</u> the officer's signal to stop is made. In order for Mr. Smith to be convicted of Attempting to Elude, the State was required to prove the crime beyond a reasonable doubt, and reversal is required if there was insufficient evidence on any element. <u>In re Winship</u>, 397 U.S. at 364; <u>Jackson v. Virginia</u>, 443 U.S. at 319. Under the statute, RCW 46.61.024(1),

> [a]ny driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

The jury was so instructed. CP 43-44 10, 11. In this case, when Deputy Dodds first located Mr. Smith's vehicle after being dispatched to the area, he followed the defendant for approximately two miles. 5/12/14RP at 83. The deputy observed Mr. Smith cross the yellow divider line two times, which he deemed to be a traffic infraction. 5/12/14RP at 86, 116.

Next, Mr. Smith's Ford Explorer "made a very abrupt move into the center lane, making a left turn onto Metcalf, and began to travel southbound." 5/12/14RP at 86. Mr. Smith also did not employ his turn signal. 5/12/14RP at 86. After observing Mr. Smith

conduct the abrupt left turn and do so in this manner, Deputy Dodds activated his squad car's lights. 5/12/14RP at 87. He followed Mr. Smith as the Ford Explorer then made a simple U-turn on Metcalf and passed him in the opposite direction. 5/12/14RP at 87-89. There was no testimony that a high rate of speed was being driven at this juncture.

Mr. Smith "then proceeded up to the area past the stop line partially into the eastbound lane of SR 520 and came to a stop." 5/12/14RP at 88. Deputy Dodds pulled directly behind the Explorer and parked, then walked up to the driver's side window. 5/12/14RP at 88-89. Mr. Smith refused to shut his vehicle down despite the deputy's requests; then, he drove away from the deputy, and performed a U-turn crossing into SR 520 and drove south on Metcalf. 5/12/14RP at 89-90. As Deputy Dodds returned to his squad car, Smith "continued to travel down Metcalf Street at a very slow speed towards the police department area." 5/12/14RP at 91.

With assistance from Sergeant Greg Adams, who had arrived on the scene in his vehicle, Deputy Dodds positioned his own vehicle as Smith started turning around again. The officers forced Smith to stop in a parking stall with a wheel up against the curb. 5/12/14RP at 91-92.

Mr. Smith reacted angrily and threateningly when the officers attempted to have him exit the Explorer, so the deputies tased him. 5/12/14RP at 98-99. Thereafter he was arrested. 5/12/14RP at 99.

(ii). Insufficient evidence. This is insufficient evidence of Eluding. Eluding requires reckless driving following a signal to stop by the officer. RCW 46.61.024(1). Certainly, a jury might be within the bounds of sufficiency to find recklessness when Mr. Smith conducted his left turn off of SR 520 (turning from westbound to southbound on the new street) because that turn caused the "traffic that was on State Route 520 that was traveling eastbound . . . to come to a stop as Mr. Smith's vehicle crossed over in front of them to travel south [on Metcalf]." 5/12/14RP at 87.

However, at that juncture, Deputy Dodds had not yet signaled the Ford Explorer to stop. Mr. Smith's abrupt left turn from SR 520 onto Metcalf was what *caused* Deputy Dodds to activate his lights. 5/12/14RP at 87. On direct examination, the deputy testified:

> Q: When you saw the vehicle do that, what was the very next thing you did?
> A: At that time I activated my emergency lights and siren.

5/12/14RP at 87.

Although the State would later argue that Mr. Smith drove recklessly after the deputy's signal to stop, the evidence did not establish recklessness. The phrase "in a reckless manner" means to drive in a "rash or heedless manner, indifferent to the consequences." State v. Roggenkamp, 153 Wn.2d 614, 622, 106 P.3d 196 (2005) (defining "reckless manner" as used in RCW 46.61.520 and 46.61.522) (quoting State v. Bowman, 57 Wn.2d 266, 270–71, 356 P.2d 999 (1960)); see also State v. Ridgley, 141 Wn. App. 771, 781, 174 P.3d 105 (2007).

The jury was so instructed. CP 45 (Instruction no. 12); see CP 29-30 (Defendant's supplemental proposed jury instructions, citing WPIC 90.05).

Here, though, Deputy Dodds repeatedly confirmed that the left turn deemed dangerous was before the deputy activated his squad car's lights, and thereafter, Mr. Smith drove at a "very slow speed." 5/12/14RP at 87, 91, 116-17, 122-23. After that point, although he may have committed further traffic infractions such as a U-turn, Mr. Smith did not drive recklessly. Deputy Dodds made clear that if Mr. Smith's U-turn when he drove away from him as he stood at the side of the Ford had been potentially dangerous, or even a traffic infraction, he would have noted it. 5/12/14RP at 121-

22. There were no pedestrians or other drivers in the area where Mr. Smith slowly drove his vehicle after briefly stopping for the deputy. 5/12/14RP at 124.

Sergeant Adams testified that he saw Mr. Smith drive away from Deputy Dodds; Smith then "slowly made a U-turn and started heading south on Metcalf street." 5/13/14RP at 10-12. There were no cars in the area when Mr. Smith made the U-turn. 5/12/14RP at 19. Smith was going slowly enough that Sergeant Adams simply drove in front of him and forced the Explorer to come up against a curb and stop. 5/13/14RP at 10-11.

It is true that the Court of Appeals held in State v. Whitcomb, 51 Wn. App. 322, 753 P.2d 565 (1988), that in order to prove that an individual attempted to elude a pursuing police vehicle, "[t]he State need not prove that anyone else was endangered by the defendant's conduct, or that a high probability of harm actually existed." Rather, the State need only show that the defendant engaged in certain conduct, "from which a particular disposition or mental state . . . may be inferred." State v. Whitcomb, 51 Wn. App. at 327.

But here, Mr. Smith did not drive in a rash manner, showing indifference to the consequences of heedless driving, "after being

given a visual or audible signal to bring the vehicle to a stop" by Deputy Dodds. Arguably, Mr. Smith might have been guilty of failing to obey a signal from the deputies under RCW 46.61.022 (A person is guilty of failing to obey an officer if he willfully fails to stop when requested or signaled to do so by a person reasonably identifiable as a law enforcement officer); see State v. Gallegos, 73 Wn. App. 644, 652, 871 P.2d 621 (1994) (failure to obey a police officer is a lesser included offense of Eluding). But there can be no attempt to elude contrary to law unless the driver drives in the proscribed manner *after* the officer gives an appropriate signal. State v. Stayton, 39 Wn. App. 46, 49, 691 P.2d 596 (1984).

b. Because the evidence was insufficient, the Eluding conviction should be reversed and the charge dismissed with prejudice.

The absence of proof beyond a reasonable doubt of an element of the crime requires reversal and dismissal. Jackson, 443 U.S. at 319; North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), reversed on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Reversal and dismissal are required here.

2. EVIDENTIARY ERROR REQUIRES REVERSAL OF THE ELUDING CONVICTION.

a. Improper testimony opining on intoxication too far encompassed the issue of whether the "under the influence" element of RCW 46.61.502 was proved, and, in combination with other related evidentiary error, was harmful as to the Eluding conviction despite the fact that Mr. Smith was acquitted of DUI.

(i) Testimony as to the "under the influence" element.

Prior to trial, the defense moved to exclude any testimony from the officers opining that Mr. Smith was "under the influence" of something. See RCW 46.61.502(5). Counsel argued that the witnesses did not know what they suspected Mr. Smith to be under the influence of, that testimony that he was under the influence was an improper conclusion, and that the law enforcement witnesses were also not drug recognition experts. See CP 23-29, at p. 2 (motion *in limine* 6); 5/12/14RP at 37-40.

The State argued that "both lay and police" witnesses could properly testify based on their life experiences, and their observations, that "the defendant appeared to be under the influence." 5/12/14RP at 39. The court ruled that such testimony was proper, and did not violate any rule prohibiting testimony on the ultimate issue. 5/12/14RP at 39, 51-52.

Mr. Gaylord then testified at trial that Mr. Smith was "under the influence of something." 5/12/14RP at 63. In addition, Deputy Dodds and Deputy Hendrickson opined that Mr. Smith was "under the influence of something," or "some intoxicant," which meant either alcohol or marijuana or both. 5/12/14RP at 104-05; 5/13/14RP at 51-52.

All of this testimony was erroneously admitted. A police officer with the pertinent training and experience can testify that a person appeared to be intoxicated by alcohol or drugs. ER 702; see City of Seattle v. Heatley, 70 Wn. App. 573, 576, 578–79, 854 P.2d 658 (1993). A lay person can also testify to his or her observations. State v. Quaale, 177 Wn. App. 603, 312 P.3d 726 (2013); ER 701. But the officer must be an expert in intoxication on the particular substance; thus, for example, only a drug recognition expert can testify that a person is under the influence of drugs. See State v. Baity, 140 Wn.2d 1, 6, 18, 991 P.2d 1151 (2000). In general, it is always improper for any person to effectively opine that the defendant is guilty; to do so is to invade the jury's exclusive province. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

Therefore the testimony of the witnesses in this case, to the extent that it indicated Mr. Smith was intoxicated by "something," including a drug, was improper. ER 702. Further, in the circumstances of this case, the deputies' testimony that Mr. Smith was "under the influence" was too close to an opinion on guilt to be admissible. To determine whether a witness's statement is improper opinion testimony on the defendant's guilt, the courts consider the circumstances of the case, including the type of defense being raised. Demery, 144 Wn.2d at 759; City of Seattle v. Heatley, 70 Wn. App. at 579. Here, the defense at trial was that none of these witnesses knew Mr. Smith, who was an unusual person who normally behaved somewhat erratically, and had unusual responses to circumstances. 5/13/14RP at 125-33. Counsel emphasized that Mr. Smith in general would mumble about things, and his behavior during the vehicle stop was consistent with this, in that he just "stare[d] off into space." 5/13/14RP at 124, 127, 135. In this context, the witnesses' statements at trial that Mr. Smith was "under the influence" -- a specific legal element of the crime of DUI -- were improper.

(ii) Testimony regarding Alcoholics Anonymous. In addition, prior to trial, the defense moved that no witness mention

the fact that Mr. Smith had been in Alcoholics Anonymous. CP 23-29, at p. 2 (motion *in limine* 7). Supp. CP ___, Sub # 76 (trial minutes, at p. 3 (5/12/14)). Under ER 404(b), evidence may not be admitted where its relevance is simply to show that the defendant has a particular character and has acted in conformity with that character. ER 404(b); State v. Gresham, 173 Wn.2d 405, 423–24, 269 P.3d 207 (2012).

However, the first witness, Mr. Gaylord, in addition to opining expressly that Mr. Smith was driving his Explorer under the influence, testified that he knew Mr. Smith from his wife's association with Alcoholics Anonymous. 5/12/14RP at 53. This evidence of Mr. Smith's association with Alcoholics Anonymous was a plain violation of ER 404(b), which prohibits evidence of past conduct or character that carries only propensity value.[3]

b. Reversal is required for the errors. An evidentiary error is grounds for reversal if it results in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). The foregoing evidentiary errors require reversal of the Eluding conviction. Even

[3] After Mr. Gaylord testified both that Mr. Smith had been in AA, and that Smith was under the influence, the prosecutor noted that it would re-advise the witnesses regarding the response of the court's motions *in limine*, 5/12/14RP at 72-73.

though Mr. Smith was acquitted of DUI on the basis of inadequate evidence, he was prejudiced by the admission of the improper evidence because the State closely linked its case, and its twin "interrelated" claims in closing argument, that Mr. Smith attempted to elude the deputy by driving recklessly, and was driving under the influence. 5/13/14RP at 113-15. It is likely that the jury found Mr. Smith guilty of Eluding in great part because of improperly admitted evidence that he was driving when he should not be. In this case, within reasonable probabilities, the errors materially affected the outcome of the Eluding trial. Reversal is required.

E. CONCLUSION.

Based on the foregoing, Mr. Smith respectfully requests this Court reverse the judgment of conviction of the trial court.

DATED this 31 day of October, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. ANDREW SMITH, Appellant.	)))))))))	NO. 71938-6-I

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