

62241-2

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NO. 62241-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

RICKY ARNTSEN,

Appellant.

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

The Honorable Linda C. Krese

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of Arntsen's Sixth Amendment right to a defense, the trial court erred in refusing to issue defense-proposed instructions on voluntary intoxication.

2. Arntsen's convictions for unlawful possession of a firearm and attempting to elude were the same criminal conduct and should have been scored as one point under the same criminal conduct rule of the Sentencing Reform Act of 1981 ("SRA").

3. The trial court erred in ordering restitution absent a causal nexus between the charged offense and the restitution sought.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has the Sixth Amendment right to have the jury instructed on his theory of defense where the instruction is supported by substantial evidence and accurately states the law. Appellant Ricky Arntsen requested a voluntary intoxication instruction with respect to the crime of attempting to elude a pursuing police vehicle. Where the instruction was supported by substantial evidence and necessary to argue Arntsen's theory of defense, was the failure to issue the instruction reversible error? (Assignment of Error 1)

2. Crimes are the “same criminal conduct” under the SRA if they were committed at the same time and place, and involve the same victim and the same intent. The “intent” prong of the “same criminal conduct” rule requires an objective assessment of the actor’s purpose in committing the crimes. Where the State theorized that Arntsen committed the crime of attempting to elude because he was a felon in possession of a handgun, and the time, place, and victim aspects of the same criminal conduct rule were satisfied, did the trial court err in concluding the two offenses were separate conduct? (Assignment of Error 2)

3. Restitution may be ordered only for injuries occurring as a result of the precise offense charged. A restitution award must be based, moreover, on a causal relationship between the offense charged and proved and the victim’s loss or damages. A jury acquitted Arntsen of two counts of assault in the second degree based on the collision of his vehicle with an unmarked police car. Did the trial court abuse its discretion in nonetheless finding restitution for damage to the car was warranted based on Arntsen’s crime of attempting to elude a pursuing police vehicle? (Assignment of Error 3)

C. STATEMENT OF THE CASE

James Harris had a grudge against Ricky Arntsen. Trial RP 911.¹ Arntsen had asked Harris to move out of their shared apartment when Arntsen learned Harris was selling drugs, and their landlord subsequently called the police. Trial RP 911. Harris believed Arntsen was responsible for the police being called. Id.

Arntsen gave Harris money when he moved out, which he did not expect Harris to repay. Trial RP 900, 903. Arntsen subsequently ran into Harris as Harris was leaving a methadone clinic. Harris apologized for not paying Arntsen, and then offered to sell Arntsen his car in exchange for an additional \$2,500. Trial RP 903. Arntsen agreed and they made plans to meet at Andy's Motel on Aurora Avenue in Edmonds to complete the sale. Id.

That evening Arntsen and his wife, Anna, drove to the motel. Arntsen and his wife waited outside while Harris brought out the bill of sale and title for the car, which he signed over to Anna Arntsen in exchange for the \$2,500. Trial RP 906. Harris had a bottle of Tanqueray gin and offered Arntsen a drink. Trial RP 907. Arntsen

¹ Transcripts of trial, sentencing, and restitution proceedings are in nine consecutively-paginated volumes referenced herein as "Trial RP" followed by page number. Other volumes are cited by date followed by page number.

stayed and drank with Harris and Anna Arntsen drove a female friend of Harris to the store to buy cigarettes. Id.

When Anna Arntsen returned, she and Arntsen went to a friend's house. Id. Anna Arntsen drove the Cadillac they had just purchased from Harris, but left their own car parked by Harris' motel because Arntsen was somewhat intoxicated. Id. While they were gone, Harris called the police and alleged Arntsen had forced him to sign over the bill of sale and title to his car at gunpoint. Trial RP 102. Harris then telephoned Anna Arntsen and told her he had called the police and that they should come back. Trial RP 728.

The police requested Arntsen return to the motel. Trial RP 908. At first Arntsen was willing to do so, but Anna Arntsen had a bad feeling about the situation, and so she drove the car and he got out about half a block away. Trial RP 909. From this vantage point he saw police stop the car at gunpoint and arrest his wife. Trial RP 728, 910. Arntsen telephoned Harris, who derisively explained that he had set him up and that Arntsen would now go to the penitentiary. Trial RP 911.

Arntsen collected his own car from the adjacent parking lot. Trial RP 925. He telephoned 9-1-1 in an effort to talk to the officers who had arrested his wife, but this did not occur. Trial RP 912. He

was frightened and frustrated, not only because of what had happened to Anna Arntsen but because prior experiences of being unfairly targeted by law enforcement made him fearful of police. Trial RP 913, 924. Arntsen drove away, unaware that he had been spotted by plainclothes detectives in an unmarked car and was being followed. Trial RP 105, 151, 154, 925.

As Arntsen crossed from Snohomish County into King County, Shoreline police officers became involved in the pursuit, and a marked Shoreline police car turned on its lights and siren for Arntsen to stop. Trial RP 108-11. Arntsen at first appeared to pull over but then drove off into Shoreline and down Roosevelt Way. Trial RP 113-16. Arntsen continued to drive south on Roosevelt with several police cars in pursuit. Trial RP 260. King County Sheriff's deputy Eric White attempted to initiate a maneuver to stop Arntsen's car, but the car did not stop and instead drove through the parking lot of a Texaco to a 7-Eleven. Trial RP 269-71. There White rammed Arntsen's driver's side with his own vehicle and got out with his gun in his hand. Trial RP 271-72, 929.

Arntsen saw the gun and, unaware that the Edmonds detectives in their unmarked car were behind him, put his own vehicle in reverse and drove backward, striking the detectives' car.

Trial RP 121, 216, 929. At this point both White and another officer fired their guns at Arntsen, striking Arntsen in the arm, ear, and back. Trial RP 278, 381, 929. Arntsen was arrested. In Arntsen's car police located a .357 Smith and Wesson revolver. Trial RP 482, 508.

The Snohomish County Prosecuting Attorney charged Arntsen by amended information with multiple felony counts arising from this incident: robbery in the first degree with a firearm enhancement, two counts of assault in the second degree (for the two officers in the unmarked car), both with firearm enhancements, one count of attempting to elude a pursuing police vehicle with a firearm enhancement, and one count of unlawful possession of a firearm in the first degree. CP 246-47. The trial court granted Arntsen's motion to represent himself at trial. 6/6/08 RP 44.

Prior to trial the court dismissed the firearm enhancements on the assault allegations. 5/23 & 29/08 RP 44-45. After concluding its case, the State dismissed the robbery allegation. Trial RP 775. A jury convicted Arntsen of unlawful possession of a firearm and attempting to elude, but refused to find he was armed with a firearm for purposes of the eluding count, and acquitted him of both counts of assault. CP 84-88.

At sentencing, Arntsen objected to the State's calculation of his offender score and argued the unlawful possession of a firearm and attempting to elude counts should be considered the same criminal conduct. Trial RP 1165, 1184-86. The trial court scored Arntsen's prior criminal history as seven-and-one-half points and rejected his same criminal conduct argument. Trial RP 1184-86. The court accordingly imposed concurrent high end sentences on both remaining counts of 22 months and 102 months confinement, based on an offender score of eight. CP 13, 17.

The State sought restitution of \$9097 based on the damage to the Edmonds police car. Trial RP 1260. Arntsen objected that this restitution claim was not sufficiently related to his conviction for eluding, especially in light of the jury's not guilty verdicts on the assault counts. Trial RP 1259-61. The court found a sufficient basis for restitution based on the damage to the police car, concluding the damage was related to Arntsen's crime of attempting to elude, and accordingly granted the State's restitution request. Trial RP 1263; CP 5-7. Arntsen appeals.

D. ARGUMENT

1. ARNTSEN WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A DEFENSE WHEN THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION.

a. Arntsen requested the jury be instructed on voluntary intoxication with respect to the crime of attempting to elude. At trial, Arntsen presented evidence that he had been drinking with Harris before the police were summoned and became somewhat intoxicated. Trial RP 906-07. The State also elicited evidence that Arntsen had used cocaine that day. Trial RP 953. Arntsen testified that he was frustrated, agitated, and afraid when he fled from police. Trial RP 926, 957, 963.

At the conclusion of the case, Arntsen requested the jury be instructed on the defense of voluntary intoxication. CP 142. The court did not issue Arntsen's proposed instruction.

b. Arntsen had the Sixth Amendment right to have the jury instructed on his theory of defense. An accused person has a due process right to have the jury accurately instructed on his theory of defense, provided the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. 5, 6, 14; California v. Trombetta, 467 U.S. 479, 485, 104

S.Ct. 2528, 81 L.Ed.2d 413 (1984); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

A “voluntary intoxication” defense allows the jury to consider evidence of intoxication in deciding whether the State proved that the defendant acted with the requisite intent. State v. Thomas, 123 Wn. App. 771, 781, 98 P.3d 1258 (2004). Unlike diminished capacity, a voluntary intoxication defense does not necessitate expert testimony, as the effects of alcohol are commonly known and the jurors can draw reasonable inferences from the evidence presented. Id. at 781-82. Thus, where the crime the State must prove contains a mens rea element and the defendant has offered evidence that he was intoxicated at the time of the crime’s commission, the defendant is entitled to have the court instruct the jury on voluntary intoxication. State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006).

c. Substantial evidence supported Arntsen's voluntary intoxication instruction and the instruction was necessary for him to argue his theory of the case, thus failure to give the instruction was reversible error. To convict Arntsen of the crime of attempting to elude, the State had to prove, *inter alia*, that during the eluding Arntsen drove in a reckless manner. RCW 46.61.024(1); CP 88. The jury was further instructed that to find Arntsen drove in a reckless manner, it had to find that he (1) drove in a rash and heedless manner and (2) was indifferent to the consequences of his driving. CP 89. Because the crime requires the State to prove a particular mental state, when it is supported by the evidence, an accused person is entitled to an involuntary intoxication instruction in a prosecution for attempting to elude. State v. Thomas, 109 Wn.2d 222, 227, 743 P.2d 816 (1987).

Arntsen did not dispute that he had eluded the police, but explained he did so because he was frightened and not thinking clearly. Trial RP 926-28, 932-33, 957, 963. Arntsen presented evidence that he was intoxicated when he committed the crime of attempting to elude. Trial RP 906-07. Additionally, the State introduced evidence that Arntsen had used cocaine shortly before his commission of the offense. Trial RP 953.

In like circumstances, appellate courts in Washington have found the failure to issue or request a voluntary intoxication instruction to be reversible error. For example, in State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003), the Court found counsel's failure to request a voluntary intoxication instruction was deficient performance requiring reversal because the jurors could have reasonably concluded the defendant's intoxication prevented him from forming the intent to "head butt" a police officer. 116 Wn. App. at 693-95. Similarly, in State v. Hackett, 64 Wn. App. 780, 827 P.2d 1013 (1992), where the defendant was prosecuted for shooting a police officer, the court found evidence that he was intoxicated on cocaine at the time of the shooting warranted the issuance of a voluntary intoxication instruction, and reversed the conviction. 64 Wn. App. at 786-87.

Here, if properly instructed, the jury could similarly have concluded that Arntsen's ability to form the requisite intent to commit the crime of attempting to elude was impaired by his intoxication. This is particularly so in light of the fact that this jury rejected the State's theory that Arntsen intentionally assaulted the plainclothes detectives in the car behind him, and refused to find a nexus between Arntsen's crime of eluding and the firearm found in

the car. This Court should conclude the trial court's failure to instruct the jury on voluntary intoxication was reversible error and reverse the conviction.

2. ARNTSEN'S CRIMES OF ATTEMPTING TO ELUDE AND UNLAWFUL POSSESSION OF A FIREARM WERE THE SAME CRIMINAL CONDUCT UNDER THE SRA.

The SRA provides for the structured sentencing of felony offenders through standard sentence ranges derived from the seriousness of the offense and the defendant's offender score. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is calculated based upon the defendant's criminal history as well as other current offenses. RCW 9.94A.589(1)(a). However, multiple current offenses count as only one crime if they constitute the "same criminal conduct." Id. "Same criminal conduct" . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Id.

Arntsen's crimes of unlawful possession of a firearm and attempting to elude plainly satisfy the time, place, and victim

requirements of the same criminal conduct rule.² At issue, then, is whether the crimes involved differing intents.

“The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next.” State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). As Arntsen argued at sentencing, the State theorized Arntsen committed the eluding “because he’s a convicted felon with a handgun.” Trial RP 1019-20, 1023, 1025, 1259-60. According to the State’s theory, therefore, the crimes were inseparable and intertwined as to Arntsen’s intent.

Although Arntsen made this argument below, the court rejected it on the basis that Arntsen was confusing intent with motive. Trial RP 1260-61. But the court’s distinction is not supported by the caselaw. Rather, crimes are the same criminal conduct where, if viewed objectively, they “furthered a single criminal purpose.” Walden, 69 Wn. App. at 188 (finding crimes shared the single ‘intent’ of sexual intercourse). Here, according to the State’s theory, both crimes furthered the single purpose of

² The victim in both a gun possession and an eluding case is the public at large. State v. Haddock, 141 Wn.2d 103, 111-12, 3 P.3d 733 (2000); State v. Webb, 112 Wn. App. 618, 624, 50 P.3d 654 (2000).

feloniously possessing the firearm. The crimes, therefore, were the same criminal conduct. Arntsen must be resentenced.

3. THE TRIAL COURT ERRED IN FINDING A CAUSAL NEXUS BETWEEN THE CRIME OF ELUDING AND THE RESTITUTION SOUGHT BY THE STATE, REQUIRING THE RESTITUTION ORDER BE STRICKEN.

The authority of a court to order restitution following a criminal conviction is governed by statute. RCW 9.94A.753(3); State v. Hennings, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). RCW 9.94A.753(3) provides in relevant part, “restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment or injury to persons, and lost wages resulting from injury.” Id.

“A restitution order must be based on the existence of a causal relationship between the crime charged and proved and the victim’s damages.” State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834 (1998) (emphasis added); State v. Johnson, 69 Wn. App. 189, 191, 847 P.2d 960 (1993).

A sentencing court’s imposition of restitution is reviewed for an abuse of discretion. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). An abuse of discretion occurs when the lower

court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Wilson, 100 Wn. App. 44, 47, 995 P.2d 1260 (2000). Here, the trial court abused its discretion by ordering restitution for Arntsen's crime of disorderly conduct because there was no causal nexus between that crime and the damages sought.

In State v. Eilts, 94 Wn.2d 489, 617 P.2d 993 (1980), the defendant was convicted of seven counts of fraud involving seven victims. In addition to compensating these victims, the trial court ordered restitution be paid to additional alleged victims who were not named in the information. 94 Wn.2d at 492-93. Applying principles of statutory construction to the predecessor statute to RCW 9.94A.753, the Court concluded, "the phrase 'crime in question' refers only to the specific crime or crimes of which a defendant is charged and convicted." Id. at 493. The Court accordingly vacated the portion of the restitution order that exceeded the trial court's statutory authority. Id. at 496.

The principle enunciated in Eilts has never been overruled. See, e.g., State v. Miszak, 69 Wn. App. 426, 427, 848 P.2d 1329 (1993) (finding restitution order "manifestly erroneous" where court imposed restitution "for losses that were not shown to have been

incurred as a result of the offense Miszak was charged with”); Woods, 90 Wn. App. at 907 (holding restitution must be based on causal link between charged crime and damages); State v. Hartwell, 38 Wn. App. 135, 141, 684 P.2d 778 (1984) (“Eilts limits restitution to victims of crimes charged and proven at trial.”).

In Miszak, the defendant pleaded guilty to attempted theft in the second degree based on the theft of jewelry on February 27, 1989, the crime charged in the information. 69 Wn. App. at 427. In his statement on plea of guilty, Miszak admitted, “On February 27, 1989 . . . I took an article of jewelry that belonged to Marjorie Dolinar with intent to deprive her of that jewelry. The jewelry was valued [at] at least \$250.” Id. Dolinar submitted a letter claiming losses for 13 items that took place “systematically” over a period of “months.” Id. at 428. This Court found that because Miszak had not agreed to pay for losses incurred as a result of uncharged incidents of theft, the trial court exceeded its statutory authority in compensating Dolinar for the full amount claimed, and reversed the restitution order. Id. at 428-29.

Similarly, in Woods, the State sought restitution for items contained in a truck that was stolen in August, even though the defendant was only accused of having possessed the vehicle in

September. 90 Wn. App. at 906. Division Two refused to “relate back” Woods’s conviction to August for purposes of restitution, finding it improper to impose restitution for Woods’s “general scheme” or based on acts “connected with” the crime charged. 90 Wn. App. at 907-909.

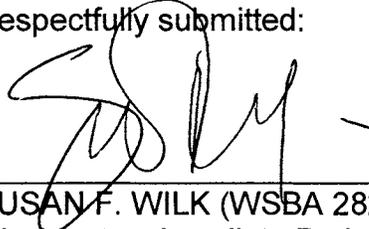
As these cases illustrate, it was “manifestly erroneous” for the trial court to order restitution for damage to the detectives’ vehicle. This is particularly so given that the jury acquitted Arntsen of both counts of assault in the second degree, thus rejecting the State’s theory that Arntsen intentionally struck the vehicle. Because there was no causal link between the offense of which Arntsen was actually convicted and the damages sought, the court abused its discretion in ordering restitution.

E. CONCLUSION

This Court should conclude that the trial court denied Ricky Arntsen his Sixth Amendment right to present a defense when it failed to issue instructions on voluntary intoxication, and grant him a new trial. In the alternative, this Court should conclude Arntsen's crimes of attempting to elude and unlawful possession of a firearm were the same criminal conduct and order Arntsen be resentenced. Last, this Court should conclude the trial court erred in finding a causal link between Arntsen's crime of attempting to elude and the restitution sought by the State, and vacate the restitution order.

DATED this 30th day of July, 2009.

Respectfully submitted:



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