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MAR 23 2010

King County Prosecutor
Appellate Unit

NO. 64208-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

CELSO GRAMAJO-MARTINEZ,

Appellant.

King County
Appellate Unit
6/10/10 10:00 AM
64208-1-I

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

The Honorable Theresa B. Doyle, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by denying the appellant's request to include a Petrich¹ instruction in the jury instructions.

Issue Pertaining to Assignment of Error

The State charged appellant Gramajo-Martinez with attempting to elude and alleged, as an enhancement, that a third party had been endangered during the pursuit. The trial evidence revealed that police initiated a pursuit, but then terminated the chase due to icy road conditions. A second, separate pursuit began when police determined that a vehicle was in danger of being hit. Because there were two separate pursuits, defense counsel requested a Petrich instruction to ensure jury unanimity. Did the trial court err in refusing a Petrich instruction where the evidence demonstrated two distinct pursuits?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecuting Attorney charged Gramajo-Martinez with possession of a stolen vehicle, attempting to elude a pursuing police vehicle, and driving while under the influence. CP 7-8. The information alleged that Gramajo-Martinez had endangered one or more persons

¹ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

during the act of eluding the police. CP 8. A jury trial commenced in August 2009. The jury found Gramajo-Martinez guilty of possessing a stolen vehicle and attempting to elude, and not guilty of driving while under the influence. CP 27-30. By means of a special verdict, the jury concluded that during the act of eluding, Gramajo-Martinez threatened “one or more persons . . . with physical injury or harm.” CP 29. The trial court sentenced Gramajo-Martinez to 25.5 months of confinement for the crimes. CP 42. Gramajo-Martinez filed a timely notice of appeal. CP 48.

2. Trial Testimony

On a frigid winter night in December 2008, Shoreline Police Officer Sarah Gerlitz noticed a truck speed past her while traveling northbound on Aurora Avenue.² 1RP 25. Appellant Celso Gramajo-Martinez was driving the truck. 1RP 33. An earlier snowstorm had left standing snow on the side of the road and black ice on the roadway itself. 1RP 23-24. Officer Gerlitz testified that the truck made an abrupt lane change, positioning itself approximately 10 feet from the bumper of a semi-truck. 1RP 27. Officer Gerlitz activated her emergency lights, got behind the truck, and

² 1RP is May 14, 2009, August 24, 2009, and August 26, 2009; 2RP is August 19, 2009; 3RP is August 20, 2009; 4RP is August 24, 2009; 5RP is August 25, 2009; 6RP is September 18, 2009.

started to follow the truck in an attempt to get Gramajo-Martinez to pull over. 1RP 27.

In response, Gramajo-Martinez increased the truck's speed and pulled away from her. 1RP 28-29. Officer Gerlitz turned on the patrol car's siren, but Gramajo-Martinez did not stop the truck. 1RP 29. Gramajo-Martinez increased his speed to approximately 80 miles per hour. 1RP 30.

Officer Gerlitz "decided to stop the pursuit" at that point due to icy road conditions. 1RP 30. Officer Gerlitz slowed down to a safe speed and continued to follow the truck. 1RP 31. Gramajo-Martinez made a right hand turn onto 205th, but entered the wrong lane of traffic. 1RP 31. Officer Gerlitz decided to "re-initiate the pursuit" because the truck presented a danger to others as it was driving in the wrong lane of travel and there were headlights approaching in the distance. 1RP 31.

As Gramajo-Martinez attempted to maneuver the truck into the proper lane of travel, the truck hit some ice, spun around, and became high-centered on a rock on the north side of the street. 1RP 32. Officer Gerlitz jumped out of her car and ran over to the truck. 1RP 32. She testified that Gramajo-Martinez continued to push down the gas pedal in an attempt to get the truck off the rock. 1RP 32. Officer Gerlitz ordered

Gramajo-Martinez out of the truck at gunpoint, ordered him to the ground, and placed handcuffs on him. 1RP 33.

Officer Gerlitz searched Gramajo-Martinez and found three screwdrivers and a flashlight in his pocket. 1RP 34. She took a closer look at the truck and noticed that the back center window was broken, there was glass from the window on the truck seat, and the steering column was damaged. 1RP 44. Officer Gerlitz asked Gramajo-Martinez who owned the truck and he responded that he had borrowed it from a friend and that the truck had been stolen previously. 1RP 49.

Gramajo-Martinez smelled of alcohol. 1RP 49. At the precinct, he refused to give a breath sample or participate in a field sobriety test. 1RP 72, 78.

Gramajo-Martinez took the stand in his own defense. He testified that a man named John Kolodzik asked for a ride home to Shoreline as a favor. 4RP 142-43. Gramajo-Martinez believed that Kolodzik was intoxicated and needed a ride. 4RP 143. Kolodzik told Gramajo-Martinez that they could drive his cousin's truck from Kent up to Shoreline. 4RP 145-47. Gramajo-Martinez testified that he dropped off Kolodzik at his apartment in Shoreline and was trying to find his way back to the freeway in the unfamiliar neighborhood when he came into contact with Officer

Gerlitz. 4RP 153. Gramajo-Martinez testified he did not see the police during the pursuit. 4RP 160.

The owner of the truck, William Kolodzik, testified that he had not given Gramajo-Martinez or anyone else permission to take his truck. 3RP 8. William Kolodzik also testified that he did not have a cousin named John Kolodzik. 3RP 16.

Just before closing argument, the trial court reviewed the jury instructions with both parties. 5RP 118. The court noted that according to the State's testimony there were two separate pursuits and discussed the applicability of a Petrich instruction, WPIC 4.25:

THE COURT: Petridge [sic] Instruction: She testified that she had her lights on for a time and then she turned all that off. Then, she re-initiated it. So, I was thinking maybe it could be she [viewed this as] two distinct incidents of the attempting to elude. I don't think the State would be arguing when she decided not to keep driving really fast to follow him, and turned off the lights and siren, I don't think that is eluding. . . .

MR. CALVO: Conduct, you're right. Actually, there are two points. Initially, I just think lights, siren. Then terminated this lights and siren and then the crash.

THE COURT: Right. That is what everyone testified re-initiating the pursuit.

. . . .

MS. MURPHY: I want to put the Pettridge [sic] language in.

....

There has been testimony that there were two different pursuits, there was the one on Aurora broke off and then another one on Lake Ballinger Way. And I think that the Pettridge [sic] instruction actually is appropriate as I'm reading it.

....

THE COURT: Well, I think I'm going to decline to give the instruction. I think it would confuse the jury to tell them that the defendant -- there's an allegation of multiple acts of Attempting to Elude on multiple occasions. It was the same occasion. And in order to make this work in our case we would have to amend. And it's very tricky amending a WPIC. It's very hard to do that. And I don't want to get into trouble.

So I'm going to decline to give that.

MS. MURPHY: I will state an exception to that, Your Honor.

5RP 118, 119, 129, 130.

In closing argument, the State emphasized that there were two separate pursuits involved:

He eludes police in the snow and in the ice.

....

And then he goes and he's trying to get away and he passes 205th and just drives up the curb, loses control of the car. They re-initiate pursuit, and he's still trying to get away. Talk about dangerous.

The whole truck flips sideways going down the road the wrong way.

The police officers re-initiate pursuit because they see headlights coming the other way.

And it was a short pursuit. But if you find anywhere in the jury instructions there's a time period to the pursuit, you should lock in on that. Because there isn't. This is the exact reason that we have the law of Attempting to Elude. And it's the exact reason why we also have the enhancement, because he endangered other people on the road that night. Those headlights coming the other way.

5RP 131-132.

Later, the State again emphasized the two distinct pursuits:

There was two different periods where they were pursuing the defendant with lights and sirens, right? He's initially going -- they catch him because he's going over the speed limit and he's following a car too close, she turns on her overhead lights, thinking this is going to be a failure to yield. Doesn't respond. He starts speeding more. Then the lights and sirens come on. It's real short. Then they decide, MP Muncy says, you know what, cut it off, it's not worth it.

They are trailing behind. And then the pursuit happens again once they see him on 205th going the wrong way. Lights and sirens again. He's trying to elude the police again.

5RP 145.

The State explained that the eluding enhancement applied because Gramajo-Martinez endangered an oncoming vehicle when he turned right on 205th and entered the wrong lane of travel:

Then Special Verdict Form A. If you find him guilty of the eluding then you have to ask yourself, during the commission of the crime, did he threaten anyone else with physical injury or harm other than the officer who was chasing him and himself. That car coming the other way. That's exactly why this is here. It's one thing to elude the police and drive recklessly in an effort to get away. It's another thing if you endanger someone else other than yourself or the police pursuing you. And you have to be unanimous on that.

The State's position is that's an easy one. He's trying to get away from the police, he's driving down a hill, it's a slight incline, and he's at the higher part of it, and the officers see headlights coming the other way. And he's going the wrong way. Because he's trying to get away from the police. And they decide that's so dangerous that they are going to re-initiate the pursuit and go lights and sirens and hopefully the other car will see this going on.

5RP 149 (emphasis added).

C. ARGUMENT

THE TRIAL COURT ERRED BY DENYING A DEFENSE REQUEST FOR A PETRICH INSTRUCTION.

"In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information

has been committed.” State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); Const. art. 1, § 22. In multiple act cases, the jury “must be unanimous as to which act or incident constitutes the crime.” State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

The proper standard of review for constitutional error is “harmless beyond a reasonable doubt.” Kitchen, 110 Wn.2d at 405 (quoting State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)). When the trial court errs by failing to issue a Petrich instruction, “the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” Kitchen, 110 Wn.2d at 406. This approach presumes that the error was prejudicial. Kitchen, 110 Wn.2d at 411.

Where the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity is assured by either: (1) requiring the prosecution to elect the act upon which it will rely for conviction; or (2) instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 572. When the prosecution chooses not to

elect, a jury instruction must be given to assure the jury's understanding of the unanimity requirement. Petrich, 101 Wn.2d at 572.

Failure to follow one of these options is "violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial. Kitchen, 110 Wn.2d at 409; Const. art. 1 § 22; U.S. Const. amend. 6. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Kitchen, 110 Wn.2d at 411.

"To apply Petrich, three questions must be asked. First, what must be proven under the applicable statute?" State v. Hanson, 59 Wn. App. 651, 656, 800 P.2d 1124 (1990). To convict on the charge of eluding, the State had to prove:

(1) That on or about the December 18, 2008, the defendant drove a motor vehicle;

(2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;

(3) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;

(4) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner;

(5) That the pursuing police officer's vehicle was equipped with lights and sirens; and

(6) That the acts occurred in the State of Washington.

Supp. CP __ (Sub no. 40C, Court's Instructions to the Jury, at 16).

"Second, what does the evidence disclose?" Hanson, 59 Wn. App. at 656. The State presented testimony from Officer Gerlitz and argued in closing that Gramajo-Martinez committed two distinct acts of eluding police. One act took place when Gramajo-Martinez failed to pull over while travelling northbound on Aurora Avenue. 1RP 25. Officer Gerlitz terminated that pursuit when she determined that she could not safely maintain contact with the truck. 1RP 30. A second pursuit occurred when Officer Gerlitz reactivated her lights after Gramajo-Martinez turned right at 205th. 1RP 31. The prosecutor explained in closing argument that there were two distinct time periods of driving that amounted to eluding. 5RP 145, 149.

"Third, does the evidence disclose more than one violation of the statute?" Hanson, 59 Wn. App. at 657.

If the evidence proves only one violation, then no Petrich instruction is required, for a general verdict will necessarily reflect the unanimous agreement that the one violation occurred. On the other hand, if the evidence discloses two or more violations, then a Petrich instruction will be required, for without it some jurors might convict on the basis of one violation while others convict on the basis of a different violation.

Hanson, 59 Wn. App. at 657. The evidence demonstrates that Gramajo-Martinez violated the eluding statute twice. Some jurors may have concluded that Gramajo-Martinez's actions during the first pursuit constituted eluding while others relied on his acts during the second pursuit in determining that he was guilty of eluding. The trial court erred in denying the defense request to issue a Petrich instruction.

The court's failure to issue a Petrich instruction is especially problematic given the endangerment enhancement attached to the eluding charge. By means of a special verdict, the court asked the jury: "Did the defendant's actions during the commission of crime in Count II of eluding a police pursuing vehicle threaten one or more persons other than the defendant or the pursuing law enforcement officer with physical injury or harm?" CP 29. There was ample testimony to support a finding that Gramajo-Martinez eluded police during the first pursuit, but there was

no testimony that anyone was endangered, other than Gramajo-Martinez and the occupants of Officer Gerlitz's patrol car.

During closing argument, the State pointed out that the endangerment enhancement applied specifically to the oncoming car observed during the second pursuit. 5RP 149. But there is far less evidence to support a finding that Gramajo-Martinez's actions during the second pursuit amounted to eluding. For instance, Officer Gerlitz was not directly behind Gramajo-Martinez when she initiated the pursuit. 1RP 31. He had already sped away and turned the corner when she activated her lights. 1RP 31. Gramajo-Martinez only travelled a short distance in the wrong lane before hitting a patch of ice and high centering the truck on the rock. 1RP 32.

The prosecutor even emphasized in closing argument that the second pursuit was very short. 5RP 132. By the time Gramajo-Martinez would have been able to see clearly that the police had reinitiated the pursuit, the truck was already stopped on the rock. 1RP 32. Given these facts, it is quite likely that some members of the jury relied on the testimony describing the first pursuit when concluding that Gramajo-Martinez was guilty of eluding, but applied the enhancement anyway

because a third party may have been endangered during the second pursuit.

The trial court's error was not harmless. If the court had issued a Petrich instruction, the jury would have had to unanimously decide which pursuit amounted to eluding. If the jury had unanimously concluded that Gramajo-Martinez's acts during the first pursuit amounted to eluding, they would have been compelled to answer "no" on Special Verdict Form A. At least one member of the jury likely had reasonable doubts regarding whether the second pursuit actually constituted eluding given the distance between the vehicles, the positioning of the vehicles, and the short timeframe of the pursuit. Yet, the jury had to unanimously conclude that the second pursuit constituted eluding in order to answer "yes" on Special Verdict Form A. The trial court failed to ensure a unanimous jury verdict. The proper remedy is reversal and remand for a new trial. Petrich, 101 Wn.2d at 573.

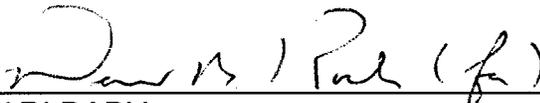
D. CONCLUSION

Because the trial court failed to instruct the jury that it must be unanimous as to which act constituted eluding, there is a great likelihood that some jurors concluded that Gramajo-Martinez's actions during the first pursuit constituted eluding while others looked to his acts during the second pursuit. This Court should reverse the eluding conviction and remand the case to the trial court for a new trial.

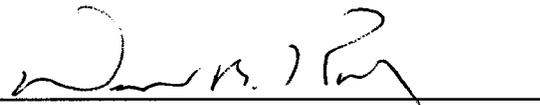
DATED this 23rd day of March 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64208-1-1
)	
CELSO GRAMAJO-MARTINEZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CELSO GRAMAJO-MARTINEZ
DOC NO. 768831
CLALLAM BAY CORRECTION S CENTER
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CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF MARCH, 2010.

x *Patrick Mayovsky*