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1-20-16

Court of Appeals
Division I
State of Washington

NO. 73323-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONNIE GREER,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

BRIEF OF APPELLANT

MARY T. SWIFT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

1. The trial court erred in refusing to instruct the jury on the lesser included offense of failure to obey an officer.

Issue Pertaining to Assignment of Error

Where appellant was charged with attempting to elude a pursuing police vehicle, did the trial court err in refusing to instruct the jury on the lesser included offense of failure to obey an officer?

B. STATEMENT OF THE CASE

On February 26, 2014, the State charged Donnie Greer with attempting to elude a pursuing police vehicle, pursuant to RCW 46.61.024. The State alleged that on August 22, 2013, while driving a motor vehicle, Greer was signaled to stop by a uniformed police officer, willfully refused to immediately do so, and then drove in a reckless manner while attempt to elude a pursuing police vehicle equipped with lights and sirens. CP 1.

The case proceeded to trial in February 2015. All the testimony and exhibits were presented to the jury in a single day, on February 24, 2015.¹

King County Sheriff's Deputy Aaron Thompson testified he and his partner, Detective Chris Przygocki, were working undercover in the White

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – February 19, 2015; 2RP – February 23, 2015; 3RP – February 24, 2015; 4RP – February 25, 2015; 5RP – February 26, 2015; 6RP – March 27, 2015.

Center neighborhood of Burien, Washington, on August 22, 2013 around 4 p.m. 3RP 7-10. Thompson explained he and Przygocki were assigned to patrol areas with high crime and gang activity. 3RP 7-8.

Both Thompson and Przygocki were dressed in plainclothes: blue jeans, t-shirts, and Thompson was wearing a baseball hat. 3RP 10, 97-98. They were dressed this way to avoid detection as police officers. 3RP 83-84. Thompson was driving an unmarked, gray Dodge Caravan minivan, with Przygocki as passenger. 3RP 10, 98. The van has a siren and lights inside the front window, but does not have the light bar across the roof like a typical police vehicle. 3RP 10. Thompson explained the van works well for undercover work because people do not suspect it to be a police vehicle. 3RP 74.

Thompson testified he and Przygocki were parked in a grocery store parking lot when they saw Greer driving a maroon sedan and decided to pull him over.² 3RP 18-19. Both officers put on their bulletproof "throw-over" vests. 3RP 12-14, 101-03. Thompson's vest said "sheriff" in yellow lettering on the front and back. 3RP 14-16, 76. Thompson put a jacket on over his vest. 3RP 19. Przygocki's vest said "police" in white or silver lettering on the front and back. 3RP 75-76, 101-03. Przygocki's police badge was not attached to the front of his vest. 3RP 103.

² The basis for the stop was not admitted at trial. 1RP 12-21.

The defense introduced the King County Sheriff's Office General Orders Manual, which is given to all officers upon graduating from the police academy. 3RP 84. Chapter 7 of the manual describes the various approved uniforms, including uniforms for officers on special assignments like bicycle units. 3RP 85-87. Nowhere in the manual does it specify the bulletproof throw-over vest is an approved uniform. 3RP 88, 179.

As Greer drove out of the parking lot, Thompson activated the van's lights and followed. 3RP 23, 27. Greer immediately pulled to the side of the road and stopped. 3RP 27-28. Przygocki got out of the passenger seat and walked toward Greer's car. 3RP 28, 105-06. He had his gun with him, possibly drawn. 3RP 124-25, 132-35. Przygocki testified he saw Greer turn around and make eye contact with him. 3RP 105-06. Przygocki later recalled, after learning Greer's name, he had previously arrested Greer in February 2013. 3RP 119-20. Thompson testified Greer then pulled away "at a normal, average speed" and "did not peel out or anything." 3RP 31.

Greer testified he saw flashing lights behind him so he pulled over. 3RP 170. As he reached for his registration in the glove box, Greer saw in the passenger mirror a person in regular clothes approaching him with a gun. 3RP 171-75. "[S]cared [he] was going to get shot" and "scared for [his] life," Greer "took off from there." 3RP 172, 175. Greer explained he was "[a] hundred percent" certain the men who pulled him over were not real

police officers. 3RP 176. Terrified, Greer headed for a retirement home on Myers Way where he knew he would be safe because there were cameras. 3RP 172-74. Greer is familiar with the retirement home because he has dropped his grandmother's friend off there before. 3RP 173-74.

As Greer pulled away, Thompson activated the van's siren, followed, and put over the police radio that a vehicle was fleeing from a traffic stop. 3RP 31. At trial, Thompson gave a detailed account of the ensuing chase. 3RP 31-63. He explained traffic was light that afternoon. 3RP 32-48. He testified they came to several four-way stops at which Greer slowed down, but did not stop. 3RP 32-48. Greer was travelling at approximately 35 to 40 miles per hour in a 25 mile per hour zone. 3RP 36-37.

Deputy James Price heard over the radio that an unmarked police car was pursuing a fleeing vehicle. 3RP 142. King County policy states that, when possible, a marked patrol car should be the lead pursuit vehicle. 3RP 142. Price was working nearby, so he decided to join the pursuit. 3RP 142. He explained he "would have either been wearing my King County jumpsuit that day or my county brown uniform. The dark brown top with light brown pants," with his badge visible. 3RP 141. He was driving a white Ford Crown Victoria with sheriff's markings on the side, a push bar on the front, dual spotlights, overhead emergency lights, and a siren. 3RP 143.

Price waited at an intersection with his lights activated and saw the two vehicles approaching. 3RP 145-46. Price moved his vehicle “slightly into the intersection in order to get Mr. Greer’s vehicle to come to a stop.” 3RP 146. Greer turned and continued down another road. 3RP 146-48. Price followed after Thompson’s vehicle and turned on his siren. 3RP 148. Price likewise said “was very minimal” that afternoon. 3RP 152.

Price eventually took over as lead vehicle. 3RP 152-53. Just as he did, Greer turned onto a downhill winding road, driving approximately 25 miles per hour. 3RP 52-53, 153-54. Price was about 10 to 12 car lengths behind Greer. 3RP 155. The winding road ends with a stop sign at Myers Way, a four-lane road with a 40 to 45 mile per hour speed limit. 3RP 153-56. There is a freeway entrance on Myers Way that Price feared Greer was heading for. 3RP 164.

Greer continued onto Myers Way without stopping. 3RP 154. Price testified Greer then reached 65 miles per hour, 3RP 154-56, but Thompson testified Greer was driving only 50 miles per hour. 3RP 53. There were no pedestrians or other cars on the roadway. 3RP 53, 163-64.

Price closed the gap to two or three car lengths behind Greer. 3RP 155. Greer noticed a sheriff behind him, so he slowed down, briefly entered the oncoming lane, and turned left into the park and ride on Myers Way. 3RP 53, 156, 164-66, 172-73. The park and ride shares an entrance with the

retirement home where Greer was headed for safety. 3RP 158, 172-73. Greer voluntarily came to a stop. 3RP 63. He had a valid driver's license and no criminal warrants. 3RP 129. Greer was "completely cooperative" as he was taken into custody. 3RP 64. The entire pursuit was 3.9 miles and lasted about four to five minutes. 3RP 72. Price was lead car for only 10 to 12 blocks of the total chase. 3RP 80.

At trial, Greer requested the jury be instructed on the lesser included offense of failure to obey: "A person commits the crime of Failure to Obey Officer when he willfully fails to stop when requested or signaled to do so by a person reasonably identifiable as a law enforcement officer." CP 19; see also CP 21 (lesser included instruction), 24 (failure to obey to-convict instruction). The trial court refused to give the instruction. 3RP 183-89. The court agreed there was a legal basis to give the lesser included instruction. 3RP 183. However, the court found there was no factual basis for the instruction, believing it was apparent Greer drove recklessly throughout the pursuit. 3RP 183-85.

The jury was instructed that to convict for attempting to elude a pursuing police vehicle, the following elements must be proven:

- (1) That on or about August 22, 2013, 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 signaling police officer's vehicle was equipped with lights and siren;

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

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

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

CP 43.

The parties gave their closing arguments on the morning of February 25, 2015. Supp. CP__ (Sub. No. 36A, Minute Entry, at 8). Defense counsel emphasized Thompson and Przygocki were not wearing uniforms, as defined by the General Orders Manual. 4RP 25-26. Counsel further argued it simply did not make sense that Greer would initially pull over for the police, and then drive away, unless his story were true that he was afraid for his life. 4RP 27-28. Counsel emphasized Greer had a valid license and no warrants for his arrest, giving him no reason to elude the police. 4RP 28. Finally, counsel pointed out that Greer pulled over and stopped as soon as was reasonably possible once he noticed Deputy Price's marked police car

behind him. 4RP 29-30. Greer did not drive in a reckless manner during the brief period that Price was lead vehicle. 4RP 31-32.

The jury commenced deliberations at 10:35 a.m. on the same day. Supp. CP__ (Sub. No. 36A, at 8). The jury continued deliberating through the end of the day and resumed deliberations the following day, February 26. Supp. CP__ (Sub. No. 36A, at 8). The jury did not return a verdict until 4:16 p.m. that day. Supp. CP__ (Sub. No. 36A, at 9). The jury found Greer guilty as charged of attempting to elude a pursuing police vehicle. CP 50.

At sentencing, Greer's counsel pointed out the jury deliberated for almost two entire days and "[w]hen they came in to deliver the verdict, several of them were very upset and crying." 6RP 4-5. The court imposed the low end of the standard range and waived all discretionary legal financial obligations (LFOs). 6RP 7; CP 54-56. Greer appeals. CP 62.

C. ARGUMENT

1. GREER WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF FAILURE TO OBEY AN OFFICER.

When an element of the offense remains in doubt, but the accused appears guilty of some wrongdoing, the jury is likely to resolve its doubts in favor of conviction. Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973); see also Kyron Huigens, The Doctrine of Lesser Included Offenses, 16 U. PUGET SOUND L. REV. 185, 193 (1992)

(“When faced with a choice between acquittal and conviction of a crime not quite proved by the evidence, a jury can be expected, if some sort of wrongdoing is evident, to opt for conviction.”).

This distortion of the fact-finding process is part of the rationale behind the common law rule that defendants are entitled to have the jury instructed on lesser-included offenses. Beck v. Alabama, 447 U.S. 625, 633-36, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Providing the jury with a third option of convicting on a lesser included offense “ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard.” Id. at 634.

The defense is entitled to have the jury instructed not only on the charged offense, but also on all lesser included offenses. RCW 10.61.006. In State v. Workman, the Washington Supreme Court set forth a two-prong test to determine whether the defense is entitled to an instruction on a lesser included offense: (1) each element of the lesser offense is a necessary element of the greater, charged offense (legal prong) and (2) the evidence supports an inference that only the lesser offense was committed (factual prong). 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The defense is entitled to the lesser included offense instruction when the answer to both questions is yes. State v. Condon, 182 Wn.2d 307, 316, 343 P.3d 357 (2015).

The legal prong of the Workman test is reviewed de novo. State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010). The factual prong is reviewed for abuse of discretion. Id. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). A court necessarily abuses its discretion if it based its ruling on an error of law. Id.

The attempting to elude statute provides:

Any 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 signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1). It is an affirmative defense that “(a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.” RCW 46.61.024(2).

The crime of attempting to elude is best analyzed by examining its elements in chronological order. State v. Duffy, 86 Wn. App. 334, 340, 936 P.2d 444 (1997); 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 94.02 cmt, at 333 (3d ed. 2008) (WPIC). First, a uniformed officer in a vehicle equipped with lights and sirens gives a

signal to stop. Duffy, 86 Wn. App. at 340. Second, the driver willfully fails to stop immediately. Id. Third, the driver drives in a reckless manner while attempting to elude the pursuing police vehicle. Id. All three elements must occur *in sequence* before the crime has been committed. Id.

It is an element of the crime that the officer who signals the driver to stop be in uniform, even if known by the driver to be a police officer. State v. Hudson, 85 Wn. App. 401, 404-05, 932 P.2d 714 (1997); State v. Fussell, 84 Wn. App. 126, 128-29, 925 P.2d 642 (1996). “Immediately” means “stopping as soon as reasonably possible once signaled by a police officer to halt.” State v. Sherman, 98 Wn.2d 53, 57, 653 P.2d 612 (1982).

It is also a crime to fail to obey an officer. That statute provides:

Any person who willfully fails to stop when requested or signaled to do so by a person reasonably identifiable as a law enforcement officer or to comply with RCW 46.61.021(3), is guilty of a misdemeanor.

RCW 46.61.022. Failure to obey an officer is a lesser included offense of attempting to elude under the legal prong of the Workman test. State v. Gallegos, 73 Wn. App. 644, 652, 871 P.2d 621 (1994); WPIC 94.02 cmt, at 333. The trial court agreed the legal prong was met. 2RP 168-70; 3RP 183.

The factual prong of the Workman test is satisfied when the evidence would permit a jury to rationally find the accused guilty of the lesser offense and acquit him of the greater. State v. Fernandez-Medina, 141 Wn.2d 448,

455, 6 P.3d 1150 (2000). In making this determination, the court must consider all evidence presented at trial by either party. Id. at 456. On appeal, the court must view the evidence in the light most favorable to the party requesting the lesser included offense instruction—here, the defense. Condon, 182 Wn.2d at 321.

The difference between attempting to elude and failure to obey is attempting to elude requires driving in a reckless manner, which means “driving in a rash or heedless manner, indifferent to the consequences.” CP 42; accord State v. Roggenkamp, 153 Wn.2d 614, 631, 106 P.3d 196 (2005). Whether the evidence supports an inference that Greer did not drive in a reckless manner requires close attention to the sequence of events.

Using lights, Thompson and Przygocki signaled for Greer to stop as he pulled out of the grocery store parking lot. 3RP 27. Greer did so, but then pulled away when he saw a man with a gun coming towards him. 3RP 27, 31, 171-75. As discussed above, the signaling officer must be in uniform to trigger attempting to elude. RCW 46.61.024.

Viewing the facts in Greer’s favor, Thompson and Przygocki were not in uniform. They were wearing bulletproof throw-over vests when they signaled for Greer to stop—one with “sheriff” in yellow letters and one with “police” in white letters. 3RP 14, 75-76, 101-03. These throw-over vests are

not uniforms as defined by the King County Sheriff's Office General Orders Manual. 3RP 85-88, 179.

Not until Deputy Price joined the pursuit did an indisputably uniformed police officer signal for Greer to stop. 3RP 141 (Price's testimony that he was wearing his county "jumpsuit" or "brown uniform"). The relevant question is then whether the evidence supports an inference that Greer did not drive in a reckless manner after Price signaled for him to stop.

He explained he "would have either been wearing my King County jumpsuit that day or my county brown uniform. The dark brown top with light brown pants," with his badge visible. 3RP 141.

Price took over as lead vehicle when Greer turned down the winding road toward Myers Way. 3RP 152-54. Greer drove approximately 25 miles per hours on that road. 3RP 52-53, 153-54. This is a slow speed and likely well within the speed limit. Greer then ran the stop sign at Myers Way, but Thompson and Price both testified there were no pedestrians or cars in sight. 3RP 53, 154, 163-64. This action therefore did not pose any danger to others nearby.

The speed limit on Myers Way is 40 to 45 miles per hour. 3RP 156. Price testified Greer drove 65 miles per hour on Myers Way, but Thompson said 50 miles per hour. 3RP 53, 156. Viewing the evidence in Greer's favor, he exceeded the speed limit by only five to 10 miles per hour on a

four-lane straightaway with no traffic. 3RP 53, 81. This is not excessive. Greer then slowed down and turned left into the park and ride, where he stopped. 3RP 53, 164-66, 172-73. Price said Greer briefly entered the oncoming lane as he slowed and turned left. 3RP 156. But, again, there were no other cars on the roadway.

These facts well support an inference that Greer did not drive in a reckless manner. Given the absence of nearby cars or pedestrians, Greer did not pose any danger in running the stop sign or driving at a slightly elevated speed. The jury could have rationally found Greer simply failed to come to an immediate stop after Price signaled for him to do so. This falls squarely within the definition of failure to obey an officer. The trial court abused its discretion in construing the facts in the State's favor rather than Greer's—considering the entire pursuit despite Thompson and Przygocki not being in uniform.

Gallegos provides a useful distinction. Charged with attempting to elude, Gallegos argued the trial court erred in refusing his request for a lesser included instruction on failure to obey. 73 Wn. App. at 653. This Court concluded the evidence demonstrated Gallegos drove with wanton and willful disregard for others.³ Id. Specifically, Gallegos drove through six

³ The attempting to elude statute was revised significantly in 2003. Laws of 2003, ch. 101, § 1. The former version of the statute criminalized

red lights at an excessive speed and caused two oncoming vehicles to halt abruptly to avoid colliding with him. Id. at 646-47, 653. By contrast, Greer did not drive in any such manner.

An accused person has an “absolute right” to have the jury consider a lesser-included offense if there is “even the slightest evidence” he may have committed only that offense. State v. Parker, 102 Wn.2d 161, 164, 166, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wash. 273, 276 77, 60 P. 650 (1900)). The evidence indicated Greer only failed to obey an officer. The trial court committed reversible error in refusing Greer’s proposed jury instructions on that offense.⁴

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Greer to be indigent and unable to pay for any appellate review expenses “by reason of poverty.” Supp. CP __ (Sub. No. 53, Order Authorizing Appeal In Forma Pauperis, Appointment of Counsel and Preparation of Record). If Greer does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate

driving in a “manner indicating a wanton or wilful disregard for the lives or property of others,” rather than a reckless manner, among other changes. Id.

⁴ See CP 19 (instruction defining failure to obey); CP 21-23 (standard lesser included instructions); CP 24 (failure to obey to-convict instruction); CP 25 (failure to obey verdict form).

costs.” “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Greer’s ability to pay must be determined before discretionary costs are imposed. However, the trial court made no such finding. Instead, the court waived all non-mandatory fees, including court costs and fees for a court-appointed attorney. CP 55.

Without a basis to determine that Greer has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

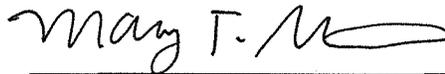
D. CONCLUSION

This Court should reverse Greer's conviction and remand for a new trial before a properly instructed jury.

DATED this 20th day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 73323-1-I
)	
DONNIE GREER,)	
)	
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 20TH DAY OF JANUARY, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DONNIE GREER
17341 32ND AVENUE, APT P-120
SEATAC, WA 98188

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JANUARY, 2016.

X *Patrick Mayovsky*