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COURT OF APPEALS

NO. 34156-5-II

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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
CLERK OF COURT
DEPUTY

STATE OF WASHINGTON,
Respondent,
v.
DAN WILLIAM COLLINS,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR LEWIS COUNTY

The Honorable H. John Hall, Judge
Cause No. 05-1-00362-1

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
I. ISSUES PRESENTED.....	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT.....	7
A. A RATIONAL TRIER OF FACT, MAKING ALL INFERENCES IN FAVOR OF THE STATE, COULD HAVE DETERMINED THAT DEPUTY DAN RIORDAN WAS IN UNIFORM WHEN HE TESTIFIED THAT HE WAS SERVING IN HIS CAPACITY AS A SHERIFF'S DEPUTY, ON PATROL, AND DRIVING A MARKED PATROL VEHICLE.....	7
B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT COLLINS' CONVICTION FOR ATTEMPTING TO ELUDE A PURSUING VEHICLE WHERE DEPUTY RIORDAN POSITIVELY AND UNEQUIVOCALLY IDENTIFIED COLLINS AS THE RIDER OF THE MOTORCYCLE, MULTIPLE DEPUTIES WITNESSED OR WERE INVOLVED IN THE PURSUIT, DEPARTMENT OF LICENSING (DOL) RECORDS IDENTIFIED DAN COLLINS AS THE REGISTERED OWNER OF THE MOTORCYCLE AND COLLINS PROVIDED NO DOCUMENTARY OR PHYSICAL EVIDENCE TO SUPPORT HIS ALIBI DEFENSE.....	12
C. THE PROSECUTOR DID NOT COMMIT FLAGRANT AND ILL-INTENTIONED MISCONDUCT BY IMPEACHING DEFENSE WITNESSES ON THE LACK OF EVIDENCE SUPPORTING THEIR ALIBI TESTIMONY WHEN IT IS THE DEFENSE'S BURDEN TO SUPPORT THE ALIBI DEFENSE TO THE EXTENT OF ESTABLISHING REASONABLE DOUBT.....	14
IV. CONCLUSION.....	16

TABLE OF AUTHORITIES

State Cases

State v. Hudson, 85 Wn. App. 401, 405, 932 P.2d 714 (1997)..... 9

State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, review denied, 84 Wn. 2d 1012 (1974) 14

State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990) 8

State v. Fussell, 84 Wn. App. 126, 925 P.2d 642 (1996)..... 10

State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003)..... 14

State v. Johnson, 19 Wn. App. 200, 574 P.2d 741 (1978)..... 15, 16

State v. Myers, 133 Wash.2d 26, 38, 941 P.2d 1102 (1997)..... 8

State v. Rosi, 120 Wn. 514, 208 P.15 (1922)..... 15

State v. Russell, 125 Wash.2d 24, 86, 882 P.2d 747 (1994) 15

State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992)..... 7, 12

Statutes

RCW 46.61.024(1)..... 5

I. ISSUES PRESENTED

- A. Could a rational trier of fact, making all inferences in favor of the State, have determined that Deputy Dan Riordan was in uniform when he testified that he was serving in his capacity as a Sheriff's deputy, on patrol, and driving a marked patrol vehicle?
- B. Did the State present sufficient evidence to support Collins' conviction for attempting to elude a pursuing vehicle where Deputy Riordan positively and unequivocally identified Collins as the rider of the motorcycle, multiple Deputies witnessed or were involved in the pursuit, Department of Licensing (DOL) records identified Dan Collins as the registered owner of the motorcycle and Collins provided no documentary or physical evidence to support his alibi defense?
- C. Did the prosecutor commit misconduct by impeaching defense witnesses on the lack of evidence supporting alibi testimony when it is the defense's burden to support the alibi defense to the extent of establishing reasonable doubt?

II. STATEMENT OF THE CASE

A. THE PURSUIT

On January 21, 2005, Deputy Dan Riordan was acting in his capacity as a patrol deputy enforcing traffic laws while driving a patrol vehicle equipped with lights and sirens. Report of Proceedings I (RP I) 56. While Deputy Riordan was responding to a traffic incident he encountered Dan Collins riding a white motorcycle and failing to yield to his emergency lights. RP I 57, 69. When Collins continued without pulling over, Deputy Riordan wrote down the license plate number and attempted to obtain a registration check through dispatch. RP I 58.

Collins then began fleeing Deputy Riordan at speeds of up to 80 miles per hour, nearly colliding with the front of the patrol car. RP I 60-61.

Deputy Riordan was able to see through the clear helmet visor and observe that Collins was a white male of large stature and that he had a ponytail down the middle of his back. RP I 62. He was wearing a white helmet and a racing jersey with the number 18 on the back. RP I 65. Collins continued fleeing, disobeying traffic laws by speeding up to 100 miles per hour, crossing over the center line into oncoming traffic, going into blind corners at high speed and running stop signs. RP I 63, RP II 21. Deputy Terry Conrad joined the pursuit briefly but Deputy Riordan called off the pursuit when Collins got on Interstate 5 and began speeding between cars.¹ RP I 64-65. Washington State Patrol observed Collins speeding southbound on I-5 but did not apprehend him. RP I 65.

Dispatch returned information on a fraudulent claim that the registered owner was Michael Blackstone at 899 Middle Fork Road . RP I 66. Deputies Riordan and Conrad went to the address to investigate and contacted Collins' mother, Wendy Collins. RP I 67-68; RP II 22. Deputy Riordan asked her about the motorcycle and the name Michael Blackstone and gave her a physical description. RP I 68. She responded that she did

¹ Deputy Matthew Wallace was also involved in the pursuit briefly and had to move off of the roadway to avoid a collision with Collins. RP II 45-46.

not know anything about the motorcycle, Michael Blackstone or the physical description. RP I 68.

The Deputies left the residence and learned from Department of Licensing (DOL) that the fraudulent claim on the registration was linked to Dan Collins. RP I 69. They returned to the residence and again spoke with Wendy Collins notifying her that the alias they had discovered belonged to her son and asked if he was present. RP I 72. She said he was not home. RP I 72. Deputy Riordan asked if he could come into the residence to check; she refused but said they could look through the window. RP I 72. Deputy Riordan looked through a front window and observed a license plate that said “Danny” as well as a white helmet that fit the description of the one worn during the pursuit. The Deputies were unable to locate Collins on that night. RP I 73.

Approximately one month later, on February 17, 2005, Deputy Conrad observed a distinctive black and silver Ford Bronco that he had seen at 899 Middle Fork Road parked at a convenience store. RP II 29. He contacted the store clerk and asked who was driving the vehicle and she replied that she was driving it and it belonged to her boyfriend, Dan Collins. RP II 30. She told Deputy Conrad that Collins was currently at 899 Middle Fork Road. RP II 30. He notified Deputy Riordan and they both went to the address. RP I 74, RP II 31. Deputy Conrad arrived first

and knocked on the door receiving no answer. RP II 31. He looked into a side window and observed Collins on his hands and knees hiding behind a wall, peeking around the corner at him. RP II 31. Deputy Conrad identified himself and asked Collins to come out and talk to him; he declined. RP II 31. They began conversing through an open window and Deputy Conrad told him why he was there. RP II 32. Collins informed him that he was not driving the motorcycle and that he had sold it last summer. RP II 32. Deputy Conrad testified that he was in full uniform when he made contact with Collins. RP II 32.

Deputy Riordan and Wendy Collins arrived approximately a half hour later. RP I 74, RP II 34. Deputy Riordan came up to the front door, saw Collins and immediately and unequivocally identified him as the motorcycle rider. RP I 74, RP II 34. He told Collins that he was under arrest for eluding but did not take him into custody but referred him to the Lewis County Prosecutor's office in order to avoid a physical confrontation. RP I 75, RP II 16, 34.

After leaving the residence, Deputy Conrad made contact with Collins' girlfriend, Roberta Backstrom. RP II 34-35. He followed Backstrom to her residence where she showed him the motorcycle that

Collins had brought to her house and put in the garage.² RP II 35. Deputy Riordan arrived and also observed the motorcycle. RP I 75-76. Backstrom then gave Deputy Conrad the name of a couple, Gary and Sharon Teitzel to speak with. RP I 46, RP II 36.

The Teitzel's knew Dan Collins as a casual acquaintance through Roberta Backstrom and he had been over to their house a couple of times. RP I 41,42, 50. The Teitzel's testified that Dan Collins arrived shortly before dark one evening with a light colored motorcycle that was having mechanical difficulties and left it at their house for two days. RP I 44-45, 48, 50. This occurred sometime in January, approximately 4-6 weeks before Deputy Conrad called them on February 17. RP I 47, 51-52.

B. PROCEDURE

The State charged Collins with one count of attempting to elude a pursuing police vehicle in violation of RCW 46.61.024(1). Clerk's Papers (CP) 64-66. The matter went to a jury trial with the Honorable H. John Hall presiding.

During trial, Deputy Conrad testified to Collins driving status -- that he was suspended in the first degree, which meant "basically a habitual traffic offender." RP I 25-26. Before allowing any testimony of Collins driving status, the court gave the jury a cautionary instruction to

² Deputy Conrad took photographs of the motorcycle at this time. RP II 36.

consider this evidence only for purposes of motive. RP I 25. Defense counsel objected to this testimony and then moved for a mistrial outside the presence of the jury. RP I 26. Defense counsel argued that Deputy Conrad's testimony exceeded the scope of the parties' prior stipulation. RP I 26. The court sustained the objection but denied the motion for a mistrial and instructed the jury to disregard Deputy Conrad's testimony. RP I 28. The State then introduced Collins' driving status as Exhibit 4, per the stipulation. RP I 28.

Collins presented an alibi defense, RP I 27-28, relying on his own testimony, that of his mother, Wendy Collins, and that of his girlfriend, Roberta Backstrom. The prosecutor thoroughly cross examined both Wendy Collins and Backstrom regarding the lack of physical or documentary evidence supporting their testimony that Collins was in Leavenworth during the time of the pursuit.³ RP II 70-71, 113, 116-17. Defense counsel did not object to this cross examination. During closing argument, the prosecutor addressed the jury's role as the sole evaluator of witness credibility and noted this lack of substantiation. RP II 149-50. Again, defense counsel offered no objection.

³ The substance of this cross examination is provided in the Opening Br. of Appellant at 18-23.

The jury returned a guilty verdict, CP 27, and the court sentenced Collins to 45 days. Sentencing RP 5; CP 15-23. Collins appealed. CP 4-14.

III. ARGUMENT

A. A RATIONAL TRIER OF FACT, MAKING ALL INFERENCES IN FAVOR OF THE STATE, COULD HAVE DETERMINED THAT DEPUTY DAN RIORDAN WAS IN UNIFORM WHEN HE TESTIFIED THAT HE WAS SERVING IN HIS CAPACITY AS A SHERIFF'S DEPUTY, ON PATROL, AND DRIVING A MARKED PATROL VEHICLE.

Collins first challenges the sufficiency of the evidence underlying his conviction for Attempting to Elude a Pursuing Police Vehicle. Appellate courts review a challenge of insufficient evidence in the light most favorable to the State to determine "whether ... any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* The reviewing court considers circumstantial evidence equally reliable as direct evidence. *State v.*

Myers, 133 Wash.2d 26, 38, 941 P.2d 1102 (1997). “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

Collins specifically challenges the evidence underlying the jury’s finding that Officer Riordan was in uniform. He asserts that there was “no proof that the officers involved in the pursuit were in uniform.” Opening Br. of Appellant at 14. Yet Deputy Riordan testified that at the time of the incident he was acting in his capacity as a patrol deputy whose duties include enforcing traffic laws, that he was responding to a traffic incident when he encountered Collins, that he was driving a patrol vehicle equipped with lights and a siren, that he communicated with Central Dispatch and other officers, and that he continued to respond to calls after he lost sight of Collins. RP 56-59, 65. Additionally, Wendy Collins testified that two officers came to her house to look for Collins. RP 88-89. By challenging the sufficiency of the evidence, Collins admits the truth of this evidence, and any reasonable inferences that can be drawn from that evidence. Further, as stated above and acknowledged by Collins, circumstantial evidence is equally reliable as direct evidence. Thus, a rational jury could infer that a deputy sheriff on duty and enforcing traffic laws was in uniform, and was recognized as a law enforcement officer by Collins’ mother due—at least in part—by virtue of being in uniform.

Indeed, it would be an *unreasonable inference not* supported by the evidence to conclude that Deputy Riordan was *not* in uniform during this incident.

Collins asserts that the fact that Deputy Riordan was in a marked patrol vehicle—without more—is insufficient to allow a trier of fact to infer that the deputy was in uniform. This defies the well-established standards applied by appellate courts in analyzing challenges to the sufficiency of the evidence, and common sense. Incredibly, there is authority for Collins’ position. In *State v. Hudson*, Division I of the Court of Appeals held that, without more, the fact that the officers were in marked patrol vehicles was “insufficient to permit a rational trier of fact to infer beyond a reasonable doubt that these officers were in uniform.” 85 Wn. App. 401, 405, 932 P.2d 714 (1997). *Hudson* is problematic in several respects. First, the opinion is bereft of any facts on which to evaluate its credence or its applicability to other cases. The opinion refers to unchallenged findings, suggesting that the case was either tried to the bench, or submitted on stipulated facts. Either scenario might explain the paucity of facts in the opinion. This might also support the validity of the court’s ruling in that case, as well as explain the “without more” reference. Insofar as the facts available to the *Hudson* court appear to have been limited at best, its applicability to the present case is limited or non-

existent. Second, the *Hudson* court also acknowledged the proper standard for analyzing sufficiency claims--that rational inferences from the evidence must be construed in favor of the State and against Hudson, but then did the opposite—i.e., construed the evidence and inferences in Hudson’s favor, and rejected the logical inference that police officers driving marked patrol vehicles are generally in uniform. The *Hudson* court relied on *State v. Fussell*, 84 Wn. App. 126, 925 P.2d 642 (1996). In *Fussell*, which Collins does not cite, Division III of the Court of Appeals held that the fact that the two officers were on duty and driving a marked patrol vehicle was not sufficient to permit a rational trier of fact to infer beyond a reasonable doubt that either was in uniform. *Id.* at 129. The court’s legal analysis consists of one sentence, which—like *Hudson*—defies common sense and experience, and contradicts the longstanding standard that the evidence is to be interpreted in the State’s favor and against the appellant; that reasonable inferences shall be drawn in favor of the State; and that circumstantial evidence is equally reliable as direct evidence. Both the *Hudson* and *Fussell* decisions seem to preclude consideration of the fact that the officers were on duty and in marked patrol vehicles insofar as it tends to indicate that they were in uniform, which is inapposite of the prevailing standard for analyzing sufficiency challenges.

While the Respondent acknowledges that *Hudson* and *Fussell* provide strong support for Collins' position, this Court should carefully consider the validity of those courts' decisions before adhering to them. Indeed, the Respondent urges this Court to depart from these holdings, construe the evidence and all reasonable inferences that may be drawn therefrom in favor of the State and against Collins, and view the circumstantial evidence with due regard. Deputy Riordan was on duty as a patrol officer whose duties include enforcing traffic laws. He responded to such calls on his shift just prior to and even after the pursuit involving Collins. Collins' mother knew that he was a police officer when he contacted her that evening. From this evidence, a rational juror could reasonably conclude beyond a reasonable doubt that an on-duty patrol deputy was wearing a uniform while conducting those duties. Collins' argument to the contrary is illogical, founded on ill-determined authority, and should be rejected by this Court.

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B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT COLLINS' CONVICTION FOR ATTEMPTING TO ELUDE A PURSUING VEHICLE WHERE DEPUTY RIORDAN POSITIVELY AND UNEQUIVOCALLY IDENTIFIED COLLINS AS THE RIDER OF THE MOTORCYCLE, MULTIPLE DEPUTIES WITNESSED OR WERE INVOLVED IN THE PURSUIT, DEPARTMENT OF LICENSING (DOL) RECORDS IDENTIFIED DAN COLLINS AS THE REGISTERED OWNER OF THE MOTORCYCLE AND COLLINS PROVIDED NO DOCUMENTARY OR PHYSICAL EVIDENCE TO SUPPORT HIS ALIBI DEFENSE.

Collins further argues that the State did not present sufficient evidence to prove that he was the rider of the motorcycle pursued by law enforcement on January 21, 2005. Opening Br. of Appellant at 16. This argument is without merit.

Taking all inferences from the evidence in favor of the State and against the defendant, the State presented sufficient evidence to prove beyond a reasonable doubt that Collins was the rider of the motorcycle. *See Salinas, supra.* Deputy Riordan closely pursued Collins and observed his body type, skin color and distinctive hairstyle as well as his helmet and the motorcycle he was riding. Deputy Riordan immediately and unequivocally identified him as the motorcycle rider upon confronting him at the Collins residence on February 17. Identifying characteristics are not

limited to distinctive facial features, particularly given Collins' distinctive body type as a large white male with a long ponytail. Furthermore, during his investigation at the Collins residence on January 21, Deputy Riordan observed a helmet matching the description of the one worn by the motorcycle rider during the pursuit. Most importantly, DOL records indicated that the fraudulent registration for "Michael Blackstone" returned to Dan Collins at 899 Middle Fork Road.

Moreover, Collins denial based on his contention that he did not own or possess the motorcycle until he repossessed it on February 10th or 11th and took it over to the Teitzel residence is refuted by the Teitzel's own disinterested testimony that he brought the motorcycle over in January. Additionally, Collins' alibi witnesses were unable to substantiate their testimony with any physical or documentary evidence. As the sole evaluator of witness credibility, the jury was justified in disbelieving the obviously interested alibi testimony proffered by Collins' mother and girlfriend. On review, circumstantial evidence is equally reliable as direct evidence and this court should hold that the evidence in this case was sufficient for a rational trier of fact to determine that Collins was driving the motorcycle evading law enforcement on January 21.

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C. THE PROSECUTOR DID NOT COMMIT FLAGRANT AND ILL-INTENTIONED MISCONDUCT BY IMPEACHING DEFENSE WITNESSES ON THE LACK OF EVIDENCE SUPPORTING THEIR ALIBI TESTIMONY WHEN IT IS THE DEFENSE'S BURDEN TO SUPPORT THE ALIBI DEFENSE TO THE EXTENT OF ESTABLISHING REASONABLE DOUBT.

Finally, Collins argues that the prosecutor committed misconduct by improperly shifting the burden of proof to the defense during cross-examination and closing argument.⁴ Opening Br. of Appellant at 16. This argument fails because the defense does have the burden of supporting an alibi defense.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). The defendant bears the burden of showing both prongs of prosecutorial misconduct. *Hughes*, 118 Wn. App. at 727. Failure to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so flagrant and ill-

⁴ In an abundance of caution, Collins also raises ineffective assistance of counsel for failure to object to the prosecutor's impeachment of alibi witnesses and closing argument. Opening Br. of Appellant at 25. However, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. *State v. Briggins*, 11 Wn. App. 687, 692, 524 P.2d 694, review denied, 84 Wn. 2d 1012 (1974). Because the prosecutor did not commit misconduct, trial counsel properly withheld objection. Collins also argues that cumulative error deprived him of a fair trial, Appellants Opening Br. at 28-29, but he fails to demonstrate any error, much less an accumulation of error.

intentioned that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994).

Assuming *arguendo* that the prosecutor imposed a burden on Collins of supporting his alibi defense, this was perfectly acceptable because it *is* the defendant's burden to support an alibi defense "to the extent of establishing reasonable doubt in the minds of the jurors as to the guilt of the accused of the crime charged." *State v. Rosi*, 120 Wn. 514, 208 P.15 (1922); *See also State v. Johnson* 19 Wn. App. 200, 574 P.2d 741 (1978) (holding that the defendant need not prove the alibi beyond a reasonable doubt but the burden is on the defendant to provide evidence in support of his claim of alibi). Thus, it was reasonable for the State to impeach alibi witnesses to the extent necessary to hold the defense to its burden.

This is exactly what the prosecutor did in this case. She did not place Collins in the position of having to prove his innocence, but rather held him accountable for adequately supporting his contention that he was not in Lewis County during the time period of the pursuit. The facts of his alibi were "peculiarly within the defendant's knowledge" and thus it was appropriate to require him to provide evidence supporting those facts.

Johnson, 19 Wn. App. at 206. It was not flagrant and ill-intentioned misconduct to hold Collins to this burden.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that Collins' convictions be affirmed and his appeal be denied.

Respectfully submitted this 14th day of August, 2006.

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CERTIFICATE

I certify that on August ~~17~~¹⁴, 2006, I mailed a copy of the foregoing supplemental response by depositing it in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

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