

No. 35061-1-II

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

STATE OF WASHINGTON,
Respondent

v.

SCOTT EUGENE RIDGLEY
Appellant

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]* DEPUTY

RESPONDENT'S BRIEF

Appeal from the Superior Court of Lewis County
Cause No. 06-1-00009-3
The Honorable Richard L. Brosey, Presiding Judge

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STATEMENT OF THE CASE

The Defendant's Statement of the Case is adequate for purposes of this appeal.

ARGUMENT

I. THERE WAS NO ERROR IN THE JURY INSTRUCTION DEFINING "IN A RECKLESS MANNER" AS IT PERTAINS TO THE CHARGED CRIME OF ATTEMPTING TO ELUDE .

The Defendant claims the jury was improperly instructed as to the "driving in a reckless manner" element of the Attempting to Elude charge. There is no published case law or other rule to support this argument discussing this element as it pertains to Attempting to Elude, and the Defendant's argument should be disregarded.

The Defendant did not object to any of the instructions at trial (3-20-06) RP at 102. Now, in this appeal, the Defendant relies upon the case of State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005), to support his argument that the State in this case used the wrong jury instruction to instruct the jury about the "in a reckless manner" element of Attempting to Elude. But this argument is misplaced because the Roggenkamp case discusses this element only as it applies to Vehicular Assault and Vehicular Homicide. The present case is an Attempting to Elude case, so the ruling in

Roggenkamp should not be applied here. As the Roggenkamp Court noted "[t]he definition of 'in a reckless manner' as used on the vehicular homicide and vehicular assault statutes is well settled in our case law." Roggenkamp, 153 Wn.2d 614, 621-622, 106 P.3d 196 (2005). But Roggenkamp's statement was made only in reference to vehicular homicide or vehicular assault cases. Thus, it is certainly not clear by any means that the ruling in Roggenkamp should be applied to Attempting to Elude cases such as the present case. And in fact there are no published cases stating that this different standard applies to Attempting to Elude cases, which is what is charged in the present case.

Furthermore, Washington Pattern Jury Instruction (WPIC), 2nd Ed. 2005 Supplement to Vol. 11A, WPIC90.05, which states "to operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences" is the instruction the Defendant is apparently arguing should have been used in the present case. WPIC 90.05. However, it is very significant that in the "note on use" for this very instruction, the note points out we should "[u]se this instruction for vehicular homicide or vehicular assault cases if the case involves either operating a motor vehicle in a reckless manner or operating a motor vehicle with

disregard for the safety of others." Washington Pattern Jury Instructions Criminal, 2nd Ed., 2005 Supp., WPIC 90.05, p. 65. (Emphasis added.) Similarly, in the "Comment" to WIPC 90.05 it states, "[f]or purposes of the vehicular assault and vehicular homicide statutes, operating a vehicle in "a reckless manner" means driving in a rash or heedless manner, indifferent to the consequences." Id. quoting Roggenkamp, 153 Wn.2d 614 (other citations omitted)(emphasis added). Furthermore, the reasons for making the distinction between "in a reckless manner" and "with willful or wanton disregard for the safety of others" as explained in detail by the Roggenkamp court at page 626 and 627, have absolutely nothing to do with the crime of Attempting to Elude (the crime charged here) and the terms are discussed solely in the context of Vehicular Assault or Vehicular Homicide in Roggenkamp.

Notably, the "to convict" instruction given in the present case does use the "in a reckless manner" language of the current Attempting to Elude statute. CP 30. RCW 46.61.024. Moreover, Instruction Number 6 also refers to this new language when it states "he drives his vehicle in a reckless manner." CP29. However, given the warning of the "note on use" related to the definition of "driving in a reckless manner" mentioned above,

pointing out that the definition set out by that instruction should be used only in vehicular homicide or vehicular assault cases, it is not surprising that the State would not use that particular instruction, which the Defendant is now claiming should have been used.

Instead, the State's instructions went on to set out the usual instruction for driving recklessly (Instruction No. 10): "A person drives recklessly when he drives a vehicle in willful or wanton disregard for the safety of persons or property." CP 33. Then, still following the current WPICs for Attempting to Elude, the State included the instruction for "Willful and Wanton," which, frankly, contains similarly onerous words as does the definition of "in a reckless manner." In Instruction No. 8 (CP 31), the "Willful and Wanton" instruction given in the present case, the State followed the standard WPIC for these cases, and we can see this instruction contains similarly burdensome language:

Willful means acting intentionally and purposely, and not accidentally or inadvertently.

Wanton means acting intentionally in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, harm the person or property of another.

Instruction No. 8 (emphasis added), CP 31, WPIC 95.10 (2005). Compare this language to the definition of driving in a reckless manner: "driving in a rash or heedless manner, indifferent to the consequences." State v. Roggenkamp, 153 Wn.2d 614, 622, 106 P.3d 196 (2005) (emphasis added). This language seems very close to "acting intentionally in heedless disregard of the consequences," which is part of the "Willful and Wanton" instruction (Instruction No. 8)given in the present case. CP 31.

But again, no published case to date has held that the "Willful and Wanton" instruction given in this case is improper or must be changed in view of Roggenkamp, supra, or the change in statutory language in the Attempting to Elude statute. Similarly, there is no new Washington Pattern Jury Instruction (WPIC) which has changed the "Willful and Wanton" instructions that have always been given, along with the other packet of jury instructions, in the Attempting to Elude cases. In fact the "note on use" for the above-quoted WPIC 95.10 (Willful and Wanton) directs that this instruction is to be used only with Reckless Driving charges or, Attempting to Elude a Pursuing Police Vehicle, (the crime charged here). See Note on use, WPIC 95.10 (2005). Indeed, as far as the State knows, Prosecutors use the WPICs as guidelines in every case.

See e.g., State v. Davis, note 47, 116 Wn.App 81, 96, 64 P.3d 661 (2003), where that Court noted, "[w]hile the WPIC's are not binding on the court, they are persuasive authority," citing State v. L.J.M., 79 Wn. App. 133, 140, 900 P.2d 1119 (1995), rev'd on other grounds, 129 Wn.2d 386, 918 P.2d 898 (1996).

In short, what the State did in the present case, as it does in every case, is use the Washington Pattern Jury Instructions (WPICS) to construct most of its jury instructions, finding that the latest WPICS still recommend using the "Willful and Wanton" instruction for Attempting to Elude. Washington Pattern Jury Instructions, 2d. Ed., 2005 Supplement to Vol. 11, p. 141. And perhaps even more importantly, while there is a definition of "reckless manner" in the WPICS (WPIC 90.05), the "note on use" for this instruction restricts its use when it states, in pertinent part, to "[u]se this instruction for vehicular homicide or vehicular assault cases . . ." Id. at p. 65 (emphasis added). And, while the Roggenkamp Court vigorously disagreed that the "willful and wanton disregard" language was a proper description of "driving in a reckless manner," it must be remembered that all of the analysis in Roggenkamp, supra referred only to the crimes of vehicular homicide and vehicular assault. And once again, there are no

published cases discussing whether this different definition of "in a reckless manner" applies to Attempting to Elude cases.

The analysis submitted by the Defendant in this case in support of his argument that the "willful and wanton" instructions were improper in this Attempting to Elude case is off-base, as he uses the ruling in Roggenkamp as the basis for his argument that the jury instructions for Attempting to Elude have been affected by the ruling in that case. Roggenkamp discusses "in a reckless manner" solely in the context of vehicular homicide and vehicular assault cases. There are no published cases that hold that the definition of "in a reckless manner" as set out in Roggenkamp applies to Attempting to Elude cases. Accordingly, this argument should be disregarded and the Defendant's Attempting to Elude conviction should be upheld.

II. THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS UNDER THE SUPERVISION OF THE DEPARTMENT OF CORRECTIONS AT THE TIME OF THE OFFENSE AND THE JURY'S ANSWER ON THE SPECIAL VERDICT SHOULD BE UPHELD.

The Defendant also argues that under the "law of the case" doctrine, the State failed to prove that the Defendant was "on active community placement at the time of the commission of this offense." Brief of Appellant, 6. This argument is frivolous and one

of pure semantics and should be disregarded. This issue was not objected to below. But even if the Court agrees with this argument, it should be found to be harmless because the evidence that the Defendant was on community placement (or community custody-- these terms are often used interchangeably) at the time of this offense was overwhelming.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. Id. 119 Wn. 2d at 201. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The jury in the present case was instructed to use the special verdict form to determine whether or not the Defendant was on "active community placement" at the time of the commission of this offense --but only if the jury first found the Defendant guilty of Attempting to Elude. Instruction No. 15, CP 39. The trier of fact in the present case was the jury, and it obviously believed that the State met its burden in proving the Defendant was on community custody or community placement at the time of the offense. The jury here found the Defendant guilty of Attempting to Elude and also completed the Special Verdict form answering "yes" to the question, "Was the defendant, Scott Eugene Ridgley, on active community placement with the Washington State Department of Corrections at the time of the commission of the crime charged?" (3-21-06)RP 2,3.

In the present case, to prove that the Defendant was on community placement at the time of the current offense, the State called Community Corrections Officer Joann Wiest to the stand at trial. Ms. Weist explained what "community placement" means to these offenders when she testified about supervising the offenders:

I supervise approximately 45 to 60 offenders, convicted felons and gross misdemeanants. I'm responsible for

holding them accountable for their court and DOC and post conditions.

...

I go out in the field and check on them. If they're home, we do random checks, sometimes at work. I meet sometimes with their treatment providers. Sometimes we go to the offenders' homes at night. We do conduct visual searches. We perform urinalyses and Breathalyzers on them. Basically making sure that they are following the court-imposed conditions or DOC-imposed conditions.

(3-20-06) RP 42.

Ms. Weist, the CCO, then went on to explain that the Defendant, Scott Ridgley was presently on her Department of Corrections caseload. She was asked if Scott Eugene Ridgley was presently on her caseload and she responded "yes, he is." (3-20-06) RP 42. Ms. Weist testified that she began supervising Mr. Ridgley on February 7, 2005, and that Mr. Ridgley was on community custody at that time. (3-20-06) RP 43. Ms. Weist then went on to explain that "community custody" was a "new word" which used to "be called parole or probation." And she went on to give another thorough explanation of what it means to be on community custody. (3-20-06) RP 43. Ms. Weist testified that Mr. Ridgley began community custody under her supervision on the 7th of February 2005, and that he was to be on community custody for 12 months. (3-20-06) RP 43. When asked if Scott Ridgley had

maintained contact with her through 2005 , Ms. Weist said, "no, he did not." (3-20-06) RP 44. Ms. Weist also testified that Scott Ridgley had a warrant issued for his arrest on April 8th of 2005. (3-20-06) RP 44. Finally, when asked by the Prosecutor: "Was Scott Eugene Ridgley on community custody on October the 8th, 2005?" Ms. Weist replied, "yes." (3-20-06) RP 44. Additionally, at the end of the CCO's testimony, the Court admonished the jury as follows:

Ladies and gentlemen, evidence was introduced in this case on the subject of the defendant's active community placement status with the Washington State Department of Corrections. You may consider this evidence only for the purpose of proving the Special Verdict A. You must not consider this evidence as proof of the crime charged or for any other purpose.

(3/20/06) RP 46.

The State believes that the testimony of the Community Corrections Officer at trial established beyond a reasonable doubt that the Defendant was under community custody at the time of the current offense. (3-20-06) RP 41-45. She described in detail what it meant when an offender was under her supervision and that she was "supervising" the Defendant, Scott Ridgley at the time of the offense. (3-20-06)RP 42, 43. In any event, the terms "community custody" and "community placement" are often used interchangeably. See State v. Jones, 137 Wn.App. 119, 122, 151

P.3d 1056 (2007) ("The terms 'community placement' and 'community custody' are often used interchangeably to indicate that the sentenced felon is under the supervision of the Department of Corrections after release from total confinement. RCW 9.94A.030(5), (7), (34)" (emphasis added.) Thus, if there was any error, it should be seen as harmless.

At sentencing the Defendant argued that his correct offender score was 10. The Court found that the Defendant had a score of 11 points and he was sentenced to the top of the standard range for 9+ points. (7/5/06) RP 19-22. Thus, whether the Defendant had an additional point for being on "community placement" or "community custody" would not seem to make any difference at all as to his sentence if this case were remanded on this issue, since his offender score was already over 9 (and he was not given an "exceptional" sentence) --he was simply sentenced to the top of the standard range. CP 10. Because the State's evidence below proved beyond a reasonable doubt that the Defendant was under the supervision of the Department of Corrections at the time he committed the Attempting to Elude offense, the Defendant's argument as to this issue should be dismissed, or seen as

harmless, because even if this Court remanded for resentencing on extra-point-for-being-on supervision issue, it is highly unlikely that one less point would change the sentence the Defendant received in this case, given the fact that his offender score is already over 10.

CONCLUSION

The case relied upon by the Defendant in support of his argument that the jury instructions were improper for the Attempting to Elude charge applies to vehicular homicide or vehicular assault cases, and its holding should not be applied here. The WPICS have not changed for Attempting to Elude and no published case has applied the ruling of the Roggenkamp case to Attempting to Elude cases. Therefore, the Defendant's Attempting to Elude conviction should be affirmed.

Likewise, this Court should affirm the jury's finding on the Special Verdict form that the Defendant was on active community placement at the time of the underlying charge. The testimony by the Community Corrections Officer proved beyond a reasonable doubt that the Defendant was under her supervision when he committed the Attempting to Elude offense, and this portion of the

Defendant's conviction adding an extra point to his offender score
should also be upheld.

RESPECTFULLY SUBMITTED this 21st day of May, 2007.

MICHAEL GOLDEN, Lewis County Prosecutor

by:


LORI SMITH, WSBA 27961
Deputy Prosecutor, Lewis County

