

No. 42144-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Mary Upton,

Appellant.

Clallam County Superior Court Cause No. 09-1-00356-3

The Honorable Judge S. Brooke Taylor

Appellant's Reply Brief

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ARGUMENT

I. THE ELUDING CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE.

To obtain a criminal conviction, the prosecution must prove the elements of an offense beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009). In this case, the government failed to prove three elements of eluding: (1) a willful failure to stop, (2) an attempt to elude, and (3) driving in a reckless manner. RCW 46.61.024; CP 33, 34.

The officer was eight cars behind Ms. Upton when he turned on his lights. RP (3/14/11) 111; RP (3/15/11) 38. After he pulled in directly behind her, it took her “Maybe 30 to 40 seconds, 30 to 45 seconds...” for her car to stop. RP (3/15/12) 162.

This evidence does not establish a willful failure to stop, even when taken in a light most favorable to the state. To establish willfulness, the prosecution was required to prove that Ms. Upton actually believed she was being signaled to stop. It is not enough to show that a reasonable person would have understood the officer’s signal—willfulness requires proof of *actual* knowledge. *State v. Flora*, 160 Wash.App. 549, 554, 249 P.3d 188 (2011). Nothing in the record proved that Ms. Upton actually believed she was being signaled to stop. At best, the prosecution proved

that a reasonable person would have understood, but the evidence was insufficient to prove actual knowledge.

Ms. Upton's own testimony and that of her passenger show that she did not think she was being signaled. RP (3/14/11) 112; RP (3/15/11) 85-86, 114, 118. Her belief may well have been unreasonable; however, the law requires proof of *willfulness*, not unreasonableness. RCW 46.61.024. Without explanation, Respondent suggests that the jury was entitled to find that "the defendant knew the officer was attempting to pull her vehicle over." Brief of Respondent, p. 17. Respondent does not show how this finding relates to the actual evidence, especially in light of prosecution witness Seamond's testimony that Ms. Upton didn't think she was being signaled. RP (3/14/11) 112.

Nor does the record prove an attempt to elude. The prosecutor was required to show that Ms. Upton knew she was being signaled and actually intended to evade the officer. As outlined above, the evidence did not establish her knowledge. Nor does anything show that she hoped to evade the officer. She did not drive at high speeds; instead, she drove within the speed limit. She did not drive through red lights or roll past stop signs. In fact, she drove without violating any traffic laws (except for twice crossing the fog line.) The testimony shows that she continued to drive

because she believed the officer was signaling someone else. She did not continue to drive in an effort to evade the officer.

Respondent does not address Ms. Upton's argument regarding the eluding element. The absence of argument on this point may be treated as a concession. *See In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

Finally, Ms. Upton did not drive in a reckless manner. As evidence of this element, Respondent points to testimony that there was heavy traffic, that other cars were forced to brake, and that Ms. Upton traveled at 45 mph (which was within the speed limit), swerved across the fog line three times, threw debris in the air, ignored her passenger's request that she pull over, and scared the officer and her passenger. Brief of Respondent, p. 19. This is not sufficient to show that she drove in a rash or heedless manner, indifferent to the consequences. *State v. Roggenkamp*, 153 Wash.2d 614, 622, 106 P.3d 196 (2005).

The prosecution did not prove beyond a reasonable doubt that Ms. Upton willfully failed to stop, attempted to elude the officer, and drove in a reckless manner. Because of this, the eluding conviction must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

II. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE.

Article IV, Section 16 prohibits judges from commenting on the evidence at trial. *State v. Becker*, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997). Judicial comments are presumed prejudicial. *State v. Levy*, 156 Wash.2d 709, 725, 132 P.3d 1076 (2006). In this case, the judge corrected a misstatement made by the prosecutor in closing. RP (3/15/11) 180.

The problem with this remark is twofold.

First, the judge improperly resolved an ambiguity in Larsen's testimony. When asked how long he followed Ms. Upton from the time he pulled out until he was behind her, Larsen's response was "Maybe 30 to 40 seconds, 30 to 45 seconds..." RP (3/15/12) 162. The court's comment—"It was 30 to 45 second[s], I believe"—removed the officer's uncertainty ("Maybe 30 to 40 seconds") and fixed the upper limit at 45 rather than 40. RP (3/15/121) 162 (emphasis added), 180.

Jurors who believed (from the testimony) that Larsen was unsure of the time elapsed might have been swayed by the judge's comment to think that the officer had a more precise fix on the passage of time than his testimony conveyed. Thus the comment may have subtly altered the jury's perception of the evidence, in violation of Article IV, Section 16. *Becker, supra*.

Respondent erroneously asserts that “the officer actually testified” that the time was “30 to 45 seconds,” and characterizes this testimony as “undisputed.” Brief of Respondent, p. 23. This is untrue: the officer testified with much less certainty. RP (3/15/11) 162. Likewise, the prosecutor’s assertion that the comment “arguably benefited the defense” is only partially true. Brief of Respondent, p. 23. The judge’s comment transformed Larsen’s testimony to from a rough guess (“*Maybe* 30 to 40 seconds, 30 to 45 seconds...”) into a more precise estimate (“It was 30 to 45 second[s], I believe”). *See* RP (3/15/11) 162, 180. This had the effect of strengthening the prosecution’s case.

Second, the judge’s correction of the prosecutor’s misstatement implied that the judge agreed with the remainder of the government’s closing argument. The jury could infer from the judge’s comment that the prosecutor made no other errors, because if he had misspoken, the judge would have corrected him. Jurors might also have concluded that the judge agreed with the conclusions drawn by the prosecutor (or might have been unable to distinguish between conclusions and facts).

Respondent does not address this argument, focusing instead on the comment as an “isolated event,” in which the judge did not assign a “truth value” to the officer’s testimony. Brief of Respondent, pp. 20-22. This myopic focus fails to address the larger problem—that jurors could

infer that the judge believed everything else the prosecutor argued in closing.

Respondent asserts that any error was cured by the court's general instruction (which informs jurors that a judge is not permitted to comment on the evidence, and instructs them to disregard any such comments). Brief of Respondent, p. 22 (citing *State v. Elmore*, 139 Wash.2d 250, 275, 985 P.2d 289 (1999) and *State v. Ciskie*, 110 Wash.2d 263, 282, 751 P.2d 1165 (1988)). These cases do not support Respondent's position. In both *Elmore* and *Ciskie*, the Court held that there had been no comment on the evidence.

Respondent improperly attempts to argue harmless error. Brief of Respondent, p. 23. The Supreme Court has unequivocally stated that "harmless error analysis...does not apply to judicial comment claims." *State v. Boss*, 167 Wash.2d 710, 721, 223 P.3d 506 (2009). Judicial comments are presumed prejudicial, and the state must establish that "no one could realistically conclude that the element was not met." *Id.*

In this case, Larsen's testimony related to whether or not Ms. Upton (1) willfully failed to stop and (2) attempted to elude him. The jury's evaluation of the time it took for the car to pull over related directly to these two elements. In addition, an evaluation of Larsen's certainty on this point may have influenced the jury's evaluation of all his testimony.

Finally, a person could realistically conclude that these two elements had not been established. Because of this, the prosecution cannot meet its burden under *Boss*.

It would have been preferable for the court to simply remind jurors—in keeping with Instruction No. 1—that the attorney’s arguments were not evidence. CP 25. By correcting the prosecutor’s misstatement, the court improperly commented on the evidence. *Becker, supra*. Ms. Upton’s convictions must be reversed and the case remanded for a new trial. *Id.*

III. MS. UPTON’S DUI CONVICTION VIOLATED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE POLICE DEPRIVED HER OF A REASONABLE OPPORTUNITY TO OBTAIN HER OWN BLOOD TEST.

Ms. Upton rests on the argument set forth in the Opening Brief.

IV. THE SENTENCING COURT’S FINDING REGARDING MS. UPTON’S PRESENT OR FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS IS NOT SUPPORTED BY THE RECORD.

In light of Respondent’s concession, Ms. Upton rests on the argument set forth in the Opening Brief.

CONCLUSION

The convictions must be reversed, and the charges dismissed with prejudice. In the alternative, the case remanded for a new trial.

Respectfully submitted on March 9, 2012,

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 9, 2012.



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March 09, 2012 - 10:18 AM

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