

NO. 45063-1-II

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

STATE OF WASHINGTON, Respondent

v.

JEREMY IAN FRIEDAY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00476-3

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. FRIEDAY RECEIVED A SPEEDY TRIAL AND THE TRIAL COURT PROPERLY GRANTED THE STATE’S REQUEST FOR A CONTINUANCE 1

 II. SUFFICIENT EVIDENCE SUPPORTS FRIEDAY’S CONVICTIONS 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT 4

 I. I. FRIEDAY RECEIVED A SPEEDY TRIAL AND THE TRIAL COURT PROPERLY GRANTED THE STATE’S REQUEST FOR A CONTINUANCE 4

 II. II. SUFFICIENT EVIDENCE SUPPORTS FRIEDAY’S CONVICTION 9

D. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

<i>State v. Adamski</i> , 111 Wn.2d 574, 761 P.2d 621 (1988)	4, 5, 6, 7, 8
<i>State v. Amurri</i> , 51 Wn.App. 262, 753 P.2d 540 (1988).....	11
<i>State v. Engstrom</i> , 79 Wn.2d 469, 487 P.2d 205 (1971).....	10
<i>State v. Gosby</i> , 85 Wn.2d 758, 539 P.2d 680 (1975).....	9
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	9
<i>State v. McPherson</i> , 64 Wn.App. 705, 829 P.2d 179 (1992).....	7, 8
<i>State v. Nguyen</i> , 68 Wn.App. 906, 847 P.2d 936 (1993).....	6, 7
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	9
<i>State v. Ridgley</i> , 141 Wn.App. 771, 174 P.3d 105 (2007).....	12
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005)	12
<i>State v. Theroff</i> , 25 Wn.App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	9

Statutes

RCW 46.61.500	11
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Rules

CrR 3.3(e)(3).....	7
CrR 3.3(f)(2)	6
JuCR 7.8(e)(2)(ii) and (iii).....	5

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. FRIEDAY RECEIVED A SPEEDY TRIAL AND THE TRIAL COURT PROPERLY GRANTED THE STATE'S REQUEST FOR A CONTINUANCE

II. SUFFICIENT EVIDENCE SUPPORTS FRIEDAY'S CONVICTIONS

B. STATEMENT OF THE CASE

On December 2, 2012, Officer Steven Donahue of the Vancouver Police Department was on duty in uniform and a marked patrol car at approximately 9:00 p.m. when he observed a green Honda with license plate 727 AHV on Stapleton Road near Nicholson Road in Clark County, Washington. RP 82-83. Officer Donahue attempted to execute a traffic stop on the vehicle due to a headlight being out. RP 85. Officer Donahue active his overhead lights to initiate a traffic stop, and the Honda pulled over. RP 86. Officer Donahue exited his patrol vehicle to approach the Honda but the vehicle drove off. RP 88. Prior to the vehicle fleeing, Officer Donahue was able to tell that the driver was the sole occupant of the vehicle and that the driver was a white male with dark brown hair. RP 88-89.

As the vehicle fled, Officer Donahue initiated a pursuit of the vehicle up Stapleton Road. RP 89-90. The vehicle was speeding in excess of the posted 25 miles an hour speed limit causing Officer Donahue to

accelerate to between 40 and 50 miles per hour in his vehicle to catch up to the Honda. RP 90. The Honda approached the intersection at State Route 500 and stopped at the red light. RP 90. But one second later, the Honda accelerated through the red light across State Route 500 and continued northbound. RP 90. Other vehicles were in the area at this time. RP 91. The Honda continued northbound and went through a stop sign without stopping or slowing down at the intersection of 54th Avenue and 44th Street. RP 91-92. The vehicle continued driving, accelerating, and pulling away from Officer Donahue as he attempted to pursue it. RP 93. Officer Donahue slowed down and eventually lost sight of the vehicle briefly after the vehicle turned onto 59th Street. RP 94.

Officer Donahue was then notified that another Officer in the area had located the vehicle parked in a driveway on 59th Street. RP 94. This information came in approximately 30 to 40 seconds after Officer Donahue last saw the vehicle. RP 94. Officer Donahue arrived at the residence where the Honda was parked and observed it was the same vehicle he had been pursuing. RP 94. No one was in the vehicle, but he observed movement at the front door of the residence, but the door slammed shut before Officer Donahue saw anyone. RP 95. Officer Donahue attempted contact with the occupant of the residence, but no one answered the door to his attempts. RP 95. Officer Donahue also attempted

to use the siren speaker on a patrol vehicle to call the person out of the residence, but that also was met with no success. RP 95. The police then seized the vehicle and obtained a search warrant to search the vehicle. RP 97-98. Inside the vehicle, police found a bill of sale that listed the new buyer of the vehicle as Jeremy Frieday. RP 98. Police also found an insurance card inside the vehicle which listed Jeremy Frieday as the policy holder and the green Honda as the insured vehicle. RP 102-03.

Jeremy Frieday (hereafter 'Frieday') had previously been stopped in the same green Honda by police on an occasion about four months prior. RP 96, 112-14. During that prior stop, Frieday presented a state-issued identification card and told the officer his address was 4607 NE 59th Avenue. RP 114-15.

On December 12, 2012, Frieday's privilege to drive was revoked per Department of Licensing records. RP 119. Frieday's address of record with the Department of Licensing is 4607 NE 59th Ave. RP 120.

Frieday was charged by information with Attempting to Elude, Driving While Suspended, and Reckless Driving. CP 1-2. Frieday was arraigned on the information on April 1, 2013, and this was his commencement date for speedy trial calculation purposes. CP 142. Trial was set for May 28, 2013. CP 142. The State moved for a continuance because a police officer witness was unavailable for the May 28, 2013,

trial date. CP 30-33. The trial court found that the VPD Officer who was unavailable received notice of his subpoena to testify on May 14, 2013. CP 3. On that same day he let the prosecutor's office know he would be in Texas on the date of trial and was unavailable to testify. CP 3. The prosecutor notified defense counsel "right away" of the officer's unavailability and the State's intent to move for a continuance. CP 4. The State moved for the continuance at the readiness hearing on May 23, 2013. CP 30-33. Friday objected to a continuance. RP 2-9; CP 34-40. The trial court granted the continuance pursuant to CrR 3.3(f)(2) and set a new trial date. CP 33.

The jury convicted Friday of all three counts. CP 126-28. The court sentenced Friday to a standard range sentence. CP 9.

C. ARGUMENT

I. I. FRIEDAY RECEIVED A SPEEDY TRIAL AND THE TRIAL COURT PROPERLY GRANTED THE STATE'S REQUEST FOR A CONTINUANCE

Friday alleges the trial court violated his right to speedy trial under CrR 3.3 because there was insufficient evidence that the prosecutor had personally served the police officer who was unavailable for a specific trial date with his subpoena for that trial date. Friday's reliance on *State v. Adamski* to support his argument is misplaced. The trial court properly

granted the State's motion to continue pursuant to CrR 3.3 and did not abuse its discretion.

The Court in *State v. Adamski*, 111 Wn.2d 574, 761 P.2d 621 (1988) addressed a continuance in a juvenile respondent's trial that occurred the morning of trial when a witness inexplicably did not show up for trial. Importantly, distinguishing *Adamski* from the case at hand, *Adamski* involved interpretation of the Juvenile Court Rules which do not have identical language as the Superior Court Criminal Rules, and the Juvenile Court Rule that *Adamski* interprets has since been amended, rendering *Adamski* inapplicable under the current version of the rule.

In *State v. Adamski*, the prosecution sent a subpoena to a witness via the United States Postal Service and never had contact with the witness to assure receipt of the subpoena or that he would attend trial. *Adamski*, 111 Wn.2d at 576. On the morning trial was due to begin, the witness did not appear and the State moved for a continuance. *Id.* The Juvenile Rule 7.8 in effect at the time of this case, required the State exercise "due diligence" in order to obtain a continuance due to the unavailability of its evidence. Former JuCR 7.8(e)(2)(ii) and (iii). *Id.* at 577. The Supreme Court in reviewing this case found that the State did not exercise "due diligence" as required by the Juvenile Rule as it did not comply with CR 45 for service of its subpoena on its witness. *Id.* The Court found that

“failure to properly subpoena an essential witness falls below the standards of due diligence.” *Id.* at 578.

The Criminal Rule governing continuances and requests for continuances in Superior Court does not include language requiring the State act with “due diligence” in serving its witnesses with subpoenas. CrR 3.3 allows for a continuance on the written motion of a party when “such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” CrR 3.3(f)(2). There is no requirement the State acted with “due diligence” as that term is defined in *Adamski, supra*. Further, the current juvenile court rule regarding continuances has omitted the “due diligence” language that was in the rule analyzed by *Adamski, supra*. The State did not need to show it had exercised “due diligence,” but rather that a continuance was required in the administration of justice and the defendant would not be prejudiced in order to secure a continuance. CrR 3.3(f)(2). It is clear from the record that the police officer was aware of the trial court date and informed the State he was unavailable as he would be out of state. The unavailability of a witness is a good basis for a continuance. *See State v. Nguyen*, 68 Wn.App. 906, 914, 847 P.2d 936 (1993). As the trial court had a good basis to grant the continuance due to the police officer witness’ unavailability, this was not an abuse of

discretion. *See id.* Further, Friday's right to a speedy trial was not violated under the court rule as any delay caused by a continuance properly granted is excluded from the calculation of a defendant's time for trial. CrR 3.3(e)(3). Friday's trial was held within the appropriate time period as calculated under CrR 3.3. The delay due to the officer's unavailability was appropriate and the continuance was properly granted.

Even if this Court finds *Adamski* is applicable here, the State did exercise "due diligence" in notifying its witnesses of the trial date and determining their availability in advance of trial and timely requesting a continuance. In *State v. McPherson*, 64 Wn.App. 705, 829 P.2d 179 (1992), the Court of Appeals addressed the issue of how the "due diligence" requirement under the former version of the Juvenile criminal rule applies to police officer witnesses. In *McPherson*, the prosecutor had sent a police officer witness a subpoena for trial through interoffice mail. *McPherson*, 64 Wn. App. at 706. The police officer told the prosecutor that he was unavailable for the hearing as he was on vacation at that time. *Id.* The State moved for a continuance upon this information. *Id.* at 707. On appeal alleging violation of speedy trial, the Court found that the State exercised "due diligence" and that the "interagency mail procedure utilized by the prosecutor's office is reasonable and clearly calculated to assure the presence of police witnesses at trial." *Id.* at 708. The Court

recognized the extreme cost and burden on the State were the Court to require personal service on every police officer witness in every case. *Id.* The Court found the prosecutor's procedure here complied with the requirements of *Adamski, supra* when in fact the officer receives the subpoena. *Id.* at 709.

The facts involved in Frieday's case are extremely close to those in *McPherson*. Though the State here did not personally serve the police officer with a subpoena, it did send a subpoena to the police officer through the officer's trial coordinator. RP 17. The officer then alerted the prosecutor to his unavailability. CP 3-4. The officer was aware of the trial; the State then became aware of the police officer's unavailability for trial. Had the State personally served this officer with a subpoena pursuant to CR 45 as Frieday alleges was required in order to obtain a continuance, nothing would have changed about the officer's inability to be present in court when he was required to be in another state. To require the State to personally serve any witness prior to obtaining a continuance for a known unavailability is extreme and unduly burdensome. Frieday received a speedy trial and his conviction should be affirmed.

II. II. SUFFICIENT EVIDENCE SUPPORTS FRIEDAY'S CONVICTION

Friday alleges that he was convicted of all the counts on insufficient evidence. Friday's contention is meritless and there was sufficient evidence to support his convictions for Attempting to Elude, Driving while Suspended and Reckless Driving. His convictions should be affirmed.

The test for determining 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. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Evidence that is direct or circumstantial may be equally presented to the jury. Circumstantial evidence is no less reliable than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975). The jury in Friday's case was instructed that there was no distinction

between direct and circumstantial evidence in terms of its weight or value. CP 115. Though the State's case regarding the identity of Frieday as the driver of the vehicle was circumstantial, this evidence when considered in the light most favorable to the State clearly supports with sufficient evidence Frieday's convictions.

This case is similar in the amount of evidence proving Frieday was the driver of the vehicle as was presented to the jury in *State v. Engstrom*, 79 Wn.2d 469, 487 P.2d 205 (1971). In *Engstrom*, the Supreme Court found sufficient evidence to prove the defendant was the driver of the vehicle based on the fact that the vehicle belonged to him, at the time of the accident only one person was seen in the vehicle, and within an hour of the accident the vehicle was found at the defendant's residence with damage matching debris at the scene. *Engstrom*, 79 Wn.2d at 472. In Frieday's case, the defendant matched the general description of what the officer was able to ascertain of the driver: white male, dark hair. The vehicle was found in Frieday's driveway within less than one minute of the vehicle being followed by police. Documents showed Frieday was the owner of the vehicle and had insurance in his name on the vehicle. Frieday had been contacted by police previously in the same vehicle. Frieday's license to drive was suspended which gave him motive to flee a traffic stop. Based on the evidence the State presented at trial, when taken in the

light most favorable to the State and all reasonable inferences drawn, there clearly was sufficient evidence that Frieday was the driver and thus his convictions should be affirmed.

Frieday also alleges there was insufficient evidence to support his Attempt to Elude conviction and his reckless driving conviction because the State failed to establish that he drove in a “reckless manner.” Frieday in part argues there was no proof that Frieday put any people or property at risk, and that traffic was “light.” Frieday’s arguments are contrary to case law and it is clear that the State proved all the elements of the crime of Attempt to Elude beyond a reasonable doubt.

To prove reckless driving, the State had to prove that Frieday drove in a willful or wanton disregard for the safety of persons or property. RCW 46.61.500; CP 2. Exceeding the speed limit is prima facie evidence of reckless operation of a motor vehicle. *State v. Amurri*, 51 Wn.App. 262, 265, 753 P.2d 540 (1988). Contrary to Frieday’s assertion, it is not necessary to show that other persons or property were put at risk to sustain a conviction for reckless driving. *Id.* at 267. The plain language of the statute requires only that the defendant’s conduct endangered “persons or property.” *Id.* at 266-67. It is clear from the evidence that Frieday’s actions in driving demonstrated a willful or wanton disregard for the safety of persons or property, especially when viewing the evidence in

the light most favorable to the State. Frieday, exceeding the speed limit, crossed a State Route highway against a red light and failed to stop or even slow down for a stop sign at an intersection. The evidence established the elements of reckless driving and a rational jury could have convicted him and did. Frieday's conviction for reckless driving should be affirmed.

For Attempting to Elude, the State had to show Frieday drove the vehicle in a "reckless manner." Driving in a reckless manner means driving in a rash or heedless manner, indifferent to the consequences. *State v. Ridgley*, 141 Wn.App. 771, 781, 174 P.3d 105 (2007) (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005)). From the evidence presented at trial, any rational juror could find that Frieday drove in a rash or heedless manner, indifferent to the consequences. The evidence showed that Frieday ran a red light across a State Route Highway in the late evening hours. RP 90. The evidence showed he had been speeding close to twice the speed limit prior to that, and then ran a stop sign without slowing down to determine whether anyone or any other vehicles were in the intersection. RP 91-92. A rational juror could find, from this evidence, that Frieday drove in a rash and heedless manner, indifferent to the consequences. Frieday's claim of insufficiency of the evidence for his Attempt to Elude fails.

Frieday's convictions for Reckless Driving and for Attempting to Elude should be affirmed as the evidence presented at trial supported the elements of driving in a willful or wanton disregard for the safety of person or property and driving in a reckless manner.

D. CONCLUSION

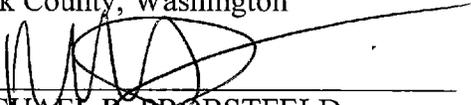
The trial court properly granted the State's request for a continuance and therefore the delay caused by the continuance was excluded from the speedy trial calculation. Frieday received a speedy trial. Frieday's convictions were based on sufficient evidence when considered in the light most favorable to the State. The trial court should be affirmed in all respects.

DATED this 28th day of March, 2014.

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