

No. 47023-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

RONUALDO CASTILLO

Appellant.

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

The Honorable, Judge Gary R. Tabor
Cause No. 14-1-00281-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether, viewing the facts in the light most favorable to the State, a rational trier of fact could have found that the defense failed to prove the affirmative defense of necessity.
2. Whether a rational trier of fact, when viewing the facts in the light most favorable to the State, could have found that the elements of second degree assault were established.
3. Whether the trial court abused its discretion by overruling defense counsel's objection to a question to the assault victim from the State about whether he feared bodily injury or death under the circumstances of the case.
4. Whether a police officer's testimony about whether or not he feared for his safety is an impermissible opinion as to the guilt of the defendant.

B. STATEMENT OF THE CASE.

On the night of February 8, 2014, Deputy Michael Brooks of the Thurston County Sheriff's Department conducted a routine traffic stop of a vehicle traveling the wrong way down 4th Avenue, a one-way street, in downtown Olympia, Washington. Report of Proceedings (RP) 38.¹ The stop took place in the parking lot of Howard's Towing at the corner of 4th Avenue and Plum Street. Id. Shortly after the stop was initiated, Trooper Guy Rosser of the Washington State Patrol arrived on the scene to provide assistance. RP 39. The two officers were discussing what to do, with Brooks

¹ All references to the Verbatim Report of Proceedings are to the two-volume transcript dated February 25, September 30, October 1, and December 18, 2014.

seated in the driver's seat of his patrol car and Rosser standing next to the vehicle talking to him through an open window. RP 45.

At this point, another civilian vehicle, a Mazda Protégé, arrived at the scene suddenly, nearly colliding with Brooks' patrol car but correcting at the last minute and avoiding a collision. RP 46-49. The driver of this vehicle was later identified as the appellant, Ronualdo Castillo. RP 75. The officers thought that Castillo might need assistance, or perhaps had been called by the driver of the vehicle they had initially stopped and his presence was related to that. RP 49, 102-3. They decided that Rosser should approach the driver of the unknown vehicle and ascertain his purpose. Id.

As Rosser approached the vehicle, Castillo made eye contact with him, and then quickly accelerated in his direction. RP 104. Rosser was able to jump out of the way of Castillo's vehicle and avoid being run over, but as he was evading the vehicle, his flashlight made contact with it, producing a sound that Brooks testified sounded like something hitting a window. RP 52.

Castillo then exited the parking lot and headed west (the wrong way) on 4th Avenue. RP 53. Brooks immediately activated his emergency lights and sirens and pursued. Id. He also made use of a device referred to as an "opticom," which changes the lights to

green on the route of a pursuit. *Id.* at 54-55. Brooks was in uniform and driving a fully marked Thurston County Sheriff patrol vehicle. *Id.* at 53-54. Castillo eluded Brooks and the other police officers who joined the chase, reaching speeds as high as 90 miles per hour. RP 62. Fourth Avenue turns back into a two way street about 9 blocks from where the incident began, around the intersection of 4th Avenue and Water Street. Exhibit 3.

Castillo continued to elude the police, leading them west, through West Olympia on Harrison, which becomes Mud Bay Road, and eventually 2nd Avenue. RP 53-85, 108-120. He led them out of Olympia altogether and into rural Thurston County. *Id.* When the county road ended, Castillo pulled onto a gravel road and into a driveway and was finally apprehended. *Id.* The State Patrol's dash cam video clearly shows that Castillo was apprehended a substantial distance from where he was initially signaled to pull over. Exhibits # 3, 4, 5.

Brooks testified that when he arrested Castillo, Castillo was smiling and did not seem afraid. RP 58-86. Brooks further testified that when arrested, Castillo asked him "but I'm a good driver though?" as though fishing for a compliment on his driving skills. RP

174. When Rosser asked Castillo why he had tried to run him over, Castillo replied, "Sorry." RP 122.

Sergeant Dave Odegaard of the Thurston County Sheriff's Department arrived at the scene after Castillo had been apprehended and, being advised that the suspect had been read his rights per Miranda², proceeded to question him. RP 179-80. When he asked why Castillo attempted to elude the police, Castillo laughed and answered that he normally drives that way, but other police agencies don't chase him. RP 180-81. When asked why he tried to run over a State Patrol Trooper, Castillo again laughed and answered "because I can." Id.

Castillo was charged with Second Degree Assault and Attempting to Elude a pursuing police officer. CP 10, 21. At trial, Castillo denied assaulting Rosser with his vehicle and raised the affirmative defense of necessity to Attempting to Elude a Pursuing Police Vehicle. RP 137-47. Castillo's testimony asserted that he believed the sound of Rosser's flashlight impacting his vehicle was a gun shot and he believed the police were trying to kill him, thus necessitating his flight. RP 142. The jury was instructed on the

² Miranda v. Arizona, 384 U S 436, 86 S. Ct 1602, 16 L. Ed 2d 694 (1966).

defense of necessity. CP 41 Castillo was found guilty on both counts. RP 260-61.

C. ARGUMENT.

1. A rational jury could have found that the defense failed to prove necessity.

At trial, Castillo raised the affirmative defense of necessity to the charge of attempting to elude a pursuing police vehicle. In order to successfully raise this defense, Castillo needed to prove by a preponderance of the evidence that: (1) he believed the commission of a crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from the violation of the law, and (3) there was no legal alternative. State v. Jeffrey, 77 Wn. App. 222, 225, 889 P.2d 956 (1995) (citing to State v. Gallegos, 73 Wn. App. 644, 651, 871 P.2d 621 (1994)).

Castillo asserts that he produced sufficient evidence to prove necessity at trial, but the jury violated his due process rights by finding him guilty anyway. Appellant's Opening Brief at 1. When an affirmative defense such as necessity is raised at trial and rejected by a trier of fact, an appellate court will normally ask whether, considering the evidence in a light most favorable to the State, a

rational trier of fact could have found that the defendant failed to prove the defense in accordance with the applicable burden of proof (in this case, by a preponderance of the evidence). Karl B. Tegland, 5 Washington Practice: Evidence, §301.7 (5th ed. 2007).

In a criminal trial, the trier of fact (in this case, a jury) is the sole and exclusive judge of the evidence. State v. Embry, 171 Wn. App. 714, 739, 287 P.3d 648 (2012). Appellate courts defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. Id. at 742; State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Castillo's necessity defense relied on his own testimony. The fact that the jury did not believe his testimony is not a reversible error. The jury is the sole judge of credibility, and appellate courts do not review determinations of witness credibility made by a jury. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). Even if a reviewing court did make credibility determinations, however, Castillo's version was inconsistent with the evidence, particularly his demeanor and statements following his arrest.

In short, Castillo has an extremely heavy burden to prove reversible error on these grounds, and he has not met this burden.

2. Viewing the facts in the light most favorable to the State, a rational trier of fact could have found that the elements of second degree assault were proven.

The constitutional standard for reviewing sufficiency of the evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. State v. Bingham, 105 Wn.2d 820, 823, 719 P.2d 109 (1986) (citing Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. State v. Devries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing Green, Wn.2d at 222).

Under this standard, the question here is whether taking all evidence and testimony favorable to the State as true—including video footage, audio recordings of police radio traffic, and most importantly, the testimony of the officers—any reasonable jury could

have found the defendant guilty. Based on that evidence, it is quite clear that any rational jury could have found Castillo guilty.

3. The trial court did not abuse its discretion by overruling defense counsel's objection to the State asking the assault victim whether he feared for his safety at the time of the assault.

At trial, defense counsel objected to the prosecutor's question of Rosser, the assault victim, "And do you fear that you could have been severely injured or possibly killed by being struck by a vehicle of that size?" RP 107. Defense objected on the grounds that the question was leading and the court overruled the objection. *Id.*

Leading questions on direct examination are generally prohibited. ER 611(c). A leading question is one that suggests the interrogator's desired answer. State v. Allen, 128 Wash. 217, 225, 222 P. 502 (1924). A yes or no question is not necessarily leading. State v. Scott, 20 Wn.2d 696, 699, 149 P.2d 152 (1944); Allen, 128 Wash. at 225. Rather, a yes or no question is only leading if it is so specific that the person answering would testify in the language of the interrogator. *Id.*

In the present case, the State's question did not suggest the desired answer. If the officer was not afraid of Castillo's vehicle, he could have answered no without contradicting the prosecutor.

The prosecutor's question was undoubtedly phrased in a way that it could have been answered yes or no. However, it was not so specific that in giving a yes or no answer, the witness would be testifying in the language of the interrogator. Furthermore, the witness did not simply answer "yes" to the question. Rather, he explained his answer in his own words, stating "I've seen several people that have been hit by cars, and cars always win against people." RP 107.

Even if this court finds that the question the prosecutor asked Rosser was leading, this is still not a reversible error. The trial court has broad discretion to permit leading questions and should not be reversed absent abuse of that discretion. Stevens v. Gordon, 118 Wn. App. 43, 55-56, 74 P.3d 653 (2003) (citing State v. Delarosa-Flores, 59 Wn. App. 514, 517, 799 P.2d 736 (1990)); State v. Dalton, 43 Wash. 278, 86 P. 590 (1906); State v. Hill, 45 Wash. 694, 89 P. 160 (1907); State v. Hanson, 133 Wash. 527, 234 P. 28 (1925). The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538 (1983). The asking of a leading question is not usually a reversible error, and is only a factor added in the analysis when counsel has persistently pursued such a course of

action. Stevens, 118 Wn. App. at 55-56 (citing State v. Torres, 16 Wn. App. 254, 258, 554 P.2d 1069 (1976)).

Castillo, who bears the burden of proving the trial court's abuse of discretion, has not done so. Instead, he has merely alleged such abuse without explaining how the court abused its discretion. Furthermore, the court should not reverse on these grounds because there is no allegation made that the prosecutor asked more than a single leading question. Castillo has not shown, or even made the claim, that this was a course of action persistently pursued by the State, thus the asking of this question should not even be factored into the analysis.

The admission of Rosser's statement was within the discretion of the trial court. Because the trial court properly exercised this discretion and admitted the statement, there is no reasonable basis to claim that the evidence was insufficient to convict Castillo of Assault in the Second Degree.

4. Rosser's statement that he feared serious bodily injury or death was not an impermissible opinion as to the guilt of the defendant.

Castillo alleges that when Rosser answered that he feared serious bodily injury or death, this was an impermissible opinion of

his guilt that took the issue away from the jury. Appellant's Opening Brief at 1. This argument has no merit.

Improper opinion testimony as to the guilt of a defendant can be raised for the first time on appeal as a "manifest Constitutional error." State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (citing State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995)); State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 232 (2004). However, the Supreme Court of Washington has held that "admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error." State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). "Manifest error" requires a nearly explicit statement by the witness as to the defendant's guilt. Id.; State v. WWJ Corp., 138 Wn.2d 595, 604, 980 P.2d 1257 (1999).

In this case, Rosser did not express his opinion as to whether or not the defendant was guilty of the charge. RP 107. Rather, he merely affirmatively answered a question about what he thought and how he felt at the time of the offense. Id. Castillo argues that this amounts to an opinion as to his guilt because the victim's fear of injury or death is an essential element of the crime. Appellant's Opening Brief at 21-22. However, there is no authority that actually

supports this argument. Even the cases cited by Castillo as authority to support this assertion can be distinguished by the fact that they dealt with witnesses either testifying as to the defendant's state of mind or explicitly stating that the defendant was guilty of the alleged crime. See e.g., State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 775 (1971); State v. Montgomery, 163 Wn.2d 577, 594, 183 P.3d 267 (2008).

Even if the court finds that this was an expression of the officer's opinion, it was not impermissible. An opinion that encompasses ultimate factual issues is not an impermissible opinion as to the guilt of the defendant merely because it supports the conclusion that the defendant is guilty. State v. Hayward, 152 Wn. App. 632, 649, 217 P.3d 354 (2009). In instances where the witness is merely stating the obvious, such as an officer testifying that he arrested the defendant because he had probable cause to believe the defendant was guilty, even a direct statement by a police officer as to his or her belief in the defendant's guilt can be permissible State v. Sutherby, 138 Wn. App. 609, 617, 158 P.3d 91 (2007), *affirmed in part and reversed in part*, 165 Wn.2d 870, 204 P.3d 916 (2009).

D. CONCLUSION.

Based on the above arguments and authorities, the State respectfully requests that this court affirm the convictions of Ronualdo Castillo for Attempting to Elude a Pursuing Police Vehicle and Assault in the Second Degree.

Respectfully submitted this 7th day of July, 2015.



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July 08, 2015 - 7:52 AM

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