

NO. 47343-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

GUY MILTON SAMPLE, III , APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson, Judge

No. 14-1-02865-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does the defendant fail to establish that there is insufficient evidence of identity to support his conviction for attempting to elude a police officer when the evidence presented firmly supported the conclusion that he was the driver of a motorcycle that led police on a high speed chase through oncoming traffic while refusing to yield to police signals?
2. Should the case be remanded for resentencing to allow the presentation of evidence concerning the alleged prior convictions when the defendant's offender score was not properly established by stipulation or proof of prior offenses?

B. STATEMENT OF THE CASE.

1. Procedure

On July 22nd, 2014, Guy M. Sample, III (hereafter "defendant") was charged with Attempting to Elude a Pursuing Police Vehicle (Count I) and Resisting Arrest (Count II). CP 1-2. During a jury trial the State admitted and published six evidentiary exhibits and called three witnesses. CP 104-

5; 1RP 22, 31; 2RP 49, 59, 61, 63, 65, 67, 96, 123¹. The defense cross-examined each of the State's witnesses, but did not present a case of its own. 2RP 74-88, 113-117, 127-8.

The defendant was convicted on both counts. 3RP 5-6. On Count I, the defendant was given a drug offender sentencing alternative ("DOSA") sentence of 37.5 months; half to be served in custody, the other half to be served on community supervision in concert with the DOSA program. 5RP 11-12, 14-15; CP 80, 85-87. On Count II, the court sentenced the defendant to a 90 day sentence to be served concurrently with Count I. CP 93-96. The court waived all discretionary legal financial obligations ("LFOs") and imposed only mandatory LFOs in the amount of \$800. CP 80; 5RP 10-11.

The defendant's offender score was calculated as nine plus, based on ten prior felonies and one reckless driving misdemeanor. CP 75-77; 5RP 6. However, he did not sign the stipulation to prior record, nor did the State admit evidence into the record to prove the prior convictions. CP 75-77, 79; 5RP 4-8. Defendant filed notice of timely appeal. CP 98.

2. Facts

On July 21st, 2014 at approximately 8:00 AM, City of Roy Police Officer Tillman Atkins was on a uniformed patrol in a marked Roy Police

¹ The verbatim report of proceedings is contained in multiple volumes, designated as follows: 1RP-12/17/14; 2RP -12/18/14; 3RP – 12/19/14 (morning); 4RP- 12/19/14 (afternoon); 5RP-03/30/15 (file name incorrectly indicates that the hearing took place on 03/30/15, when in fact it occurred on 03/20/15).

Department vehicle equipped with lights and siren when he witnessed a silver motorcycle carrying a passenger on the back make an abrupt, unsafe turn on southbound State Route 507. 1RP 27-30. The driver of the motorcycle wore a black leather jacket and a blue and white helmet. 1CP 27-8. The passenger wore a grey two-toned striped sweatshirt, and appeared to be female with long hair protruding from a black helmet. *Id.*

Officer Atkins activated his patrol car's sirens and began pursuit of the motorcycle. The motorcycle driver, attempting to elude Officer Atkins, reached speeds of up to 100 mph while weaving between north and southbound lanes of State Route 507 in congested traffic and attempted evasive maneuvers onto side streets. 1RP 29-30, 34-37. Officer Atkins pulled within forty yards of the evading motorcycle and observed the driver look back at him through the motorcycle's mirror. 1RP 34. The pursuit occurred in Roy, Washington, along southbound State Route 507 between 295th St and 312th St., with the motorcycle turning off onto 288th St. and cutting through driveways mid-pursuit before returning to State Route 507. 1RP 32-38. Officer Atkins terminated pursuit of the motorcycle near 312th St. due to safety concerns and began an area check in hopes of finding the evading motorcycle and its driver. 1RP 38-40; 2RP 49-50.

Within minutes of starting an area check at approximately 8:10 AM, Officer Atkins came into contact with a visibly distraught and nervous female who matched the description of the motorcycle passenger and whose hair appeared matted and messy consistent with someone who had recently

removed a motorcycle helmet. 2RP 50-54, 76. The female was found on 320th St., approximately eight blocks from where Officer Atkins terminated pursuit. 2RP 49-50. Initial questioning by Office Atkins revealed the female to be Marie Collins, the wife of the defendant. 2RP 53-55.

At 1:09 PM, Pierce County deputies discovered an abandoned motorcycle fitting the description cached at a residence less than one block where Officer Atkins had encountered Mrs. Collins. 2RP 55-56, 59, 99-101. The motorcycle was found hidden under a “kiddie pool” at a residence along with two helmets and a leather jacket matching those worn by the riders of the eluding motorcycle. 2RP 56-57, 59, 99-103; Ex. 15.

Officer Atkins immediately responded to the deputies’ call, arrived on scene, and confirmed that the motorcycle was the one he had pursued earlier. 2RP 56-58. The motorcycle was found to be registered to the defendant. 2RP 68. Inside the pocket of the abandoned jacket Officer Atkins found a notarized court document from Tenino Municipal Court bearing the defendant’s name and signature. 2RP 61-66, 99-104; Ex. 12. The jury was presented with the both the defendant’s signature from the Tenino document and his signature on a court document from the instant case. 2RP 63-66; Ex. 12, 17.

A green pick-up passed the investigation site while police were still at the scene, stopped abruptly, reversed, and quickly accelerated to leave the area. 2RP 70, 106-8. Officers pursued the truck in a Pierce County Sherriff’s patrol car. 2RP 70, 106-7. While in vehicle pursuit, the defendant,

at the time riding in the passenger seat of the truck, leapt from the moving truck and began to run on foot. 2RP 71, 108-9. Officers pursued the defendant and, after finding him attempting to conceal himself in a ditch, arrested him. 2RP 72, 108-110.

C. ARGUMENT.

1. THE JURY'S DECISION THAT THE DEFENDANT WAS THE DRIVER OF THE MOTORCYCLE THAT ATTEMPTED TO ELUDE A POLICE VEHICLE WHILE SPEEDING THROUGH ONCOMING TRAFFIC IS SUPPORTED BY THE EVIDENCE.

For the court to find there was sufficient evidence on appeal it must determine, after viewing the evidence in the light most favorable to the State, any rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. *State v. Thereoff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980); *Salinas*, 119 Wn.2d at 201. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Circumstantial and direct evidence are

considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The defendant was convicted of attempting to elude police vehicle (RCW 46.61.024(1)), the elements of the crime were presented to the jury as follows, consistent with Washington Pattern Jury Instructions (WPIC):

- (1) That on or about July 21, 2014, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
- (3) That the signaling police officer's vehicle was equipped with lights and siren;
- (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and
- (6) That the acts occurred in the State of Washington.

CP 58; WPIC 94.02.

The defendant's challenge is limited to the identity element of the offense, element one, claiming that the State did not present sufficient evidence that he was the driver of the motorcycle. Brief of Appellant 8. Identity is a question of fact for the jury and any direct or circumstantial fact that would convince someone of "ordinary judgement" of a person's identity should be considered. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). The State presented evidence that, when viewed in the light most favorable to

the State, is sufficient to allow a reasonable trier of fact to find the defendant was the driver of the motorcycle pursued by Officer Atkins.

The jury could have reasonably inferred that Marie Collins, the wife of the defendant, was the passenger on the back of the eluding motorcycle by virtue of her physical appearance matching the motorcycle passenger, behavior consistent with someone who had just been involved in a high speed evasion, and her geographical and temporal proximity to the cached motorcycle. Officer Atkins observed Marie Collins, the defendant's wife, while conducting an area search within five minutes the termination of the pursuit. 2RP 50-51. Mrs. Collins was displaying signs of emotional distress while walking down the street with a hairstyle and clothes matching that of the motorcycle passenger. 1RP 27; 2RP 50-51, 53-55. Mrs. Collins's startled appearance and her nervous behavior strongly suggest that she had recently experienced a harrowing event. Further, police encountered the distraught Mrs. Collins less one block away from where the eluding motorcycle was found cached suggesting that she recently was around the abandoned motorcycle. 2RP 52, 59. It was consequently reasonable for the jury to conclude that Mrs. Collins was the defendant's passenger when the offense underlying the defendant's conviction occurred.

The defendant is connected to both the motorcycle, as the register owner, and to the jacket of the eluding driver, through the notarized court

document bearing the defendant's signature found in the pocket of abandoned jacket. 2RP 63-66. The eluding motorcycle was found abandoned and cached under a kiddie pool in the front yard of a residence. 2RP 55-57, 59-60, 67, 99-101; Ex. 15. A leather jacket and a helmet, matching those worn by the motorcycle driver, were found alongside the motorcycle in the same cache site. 2RP 59, 101-3. A helmet matching the one worn by the passenger was also found in the same location. *Id.* The motorcycle was registered to the defendant. 2RP 68-69. A notarized document from Tenino Municipal Court bearing the defendant's name and signature was found inside a pocket of the leather jacket left at the cache site. 2RP 63-66, 103-5; Ex. 12. At trial, the jury was presented with the signature of the defendant on court documents from the instant case to compare the signature found in the jacket pocket. 2RP 63-66, 103-5. The eluding motorcycle and garments matching the appearance of those worn by the riders being cached in the same site create a well-founded inference that the clothes were in fact those worn by the riders. 2RP 59. Therefore, the jury was reasonable to connect the defendant to the motorcycle and clothing worn by the rider, and the passenger, his wife.

These reasonable inferences of the defendant's guilt were augmented when the defendant arrived at the cache site with a large truck capable of secreting the motorcycle from the site. The defendant appeared

at the crime scene riding in the passenger seat on a large pickup truck, observed the police presence, and abruptly fled. 2RP 70, 105-6, 108-9. Police pursued the truck and the defendant again attempted to flee, this time on foot by leaping from the passenger door of the moving truck. 2RP 71, 108-9. Deputy Baker, who was at the scene, testified that in his experience as a law enforcement officer the truck was probably intended to transport the motorcycle away from the cache site. 2RP 106. The jury could deduce that the defendant had brought the pickup to retrieve his motorcycle and belongings.

Defendant's flight from the crime scene was similarly corroborative of his guilt. A deliberate attempt to avoid arrest or prosecution by departing from a "scene of difficulty" as a reaction to a guilty consciousness can be considered by the jury as circumstantial evidence attesting to the guilt or innocence of a defendant. *State v. Bruton*, 65 Wn.2d 111, 112-3, 401 P.2d 340 (1965). The defendant's flight from the investigation scene was consistent with the previous behavior of the motorcycle driver. The jury could safely infer that the defendant's flight revealed a consciousness of guilt, because a concerned motorcycle owner seeking to recover property misused by another would have logically made himself know the police instead of fleeing.

That the defendant was the driver of the fleeing motorcycle is well-supported by the evidence such that a rational juror could find it as fact. The presence of the defendant's wife in the immediate aftermath of the pursuit near the cache site; the motorcycle registration belonging to the defendant; the court slip with the defendant's signature inside the jacket worn by the driver of the motorcycle; and the defendant's reappearance in a large truck at the cache site all combine to allow the jury to infer that the defendant was in fact the driver of the eluding motorcycle. Therefore, the conviction should be affirmed.

2. DEFENDANT'S CASE SHOULD BE REMANDED TO ALLOW THE STATE TO PRESENT EVIDENCE TO SUPPORT THE CALCULATION OF DEFENDANT'S OFFENDER SCORE.

When calculating a defendant's offender score to determine his standard sentence range, a court must not consider any more information than what "is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). The State must prove the existence of a prior conviction by a preponderance of the evidence. *Id.*; *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719 (1986). The State must also prove that prior out-of-state convictions are comparable to felony offenses under Washington law. RCW 9.94A.525; *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452, 456 (1999). The proper

remedy to correct an absence of proof to support prior convictions is to remand for a sentencing hearing allowing the State to “present and the court to consider evidence of alleged prior convictions and for the defendant to be able to rebut them.” RCW 9.94A.530(2); *See State v. Cobos*, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014). The facts supporting the prior convictions presented at the remand hearing are subject to the same preponderance of the evidence standard. RCW 9.94A.530.

The defendant did not object to the calculated offender score of nine plus at trial, and in fact, relied upon it in making his sentencing recommendation to the court. 5RP 5-6. Defendant’s counsel signed the stipulation to the prior record and criminal history, but the defendant refused to do so. CP 77. The State did not submit evidence to establish the defendant’s prior convictions. 5RP 4-8. Accordingly, the case should be remanded to the trial court to allow the State to present evidence to support the convictions used to calculate his offender score and the defendant to present a rebuttal.

D. CONCLUSION.

The State presented sufficient evidence for a reasonable jury to find that the defendant was the driver of the motorcycle that attempted to elude police beyond a reasonable doubt. Therefore, the State respectfully requests that the defendant’s conviction be affirmed.

The defendant failed to stipulate to his prior criminal history and the State did not submit evidence into the record to support the convictions used to calculate the defendant's offender score. The case should then be remanded for sentencing so as to allow the State to present evidence supporting the defendant's offender score and for the defense to rebut that evidence.

DATED: December 10, 2015.

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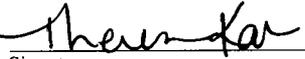


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