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Court of Appeals
Division II
State of Washington
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NO. 50517-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES R. VINES,

Appellant.

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

The Honorable Erik Rohrer, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THERE WAS INSUFFICIENT EVIDENCE THAT THE POLICE VEHICLE WAS EQUIPPED WITH A SIREN AND THAT IT "PURSUED" VINES' VEHICLE

Appellant Vines argues to this Court that the charge of attempted eluding of a pursuing police vehicle should be dismissed because there was insufficient evidence to support a finding that the vehicle driven by Sergeant Hollis was (1) equipped with a siren, and (2) it was in motion – or in pursuit – of Vines' vehicle before Vines became stuck. Brief of Appellant at 23-28.

RCW 46.61.024 provides:

- (1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude *a pursuing police vehicle*, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and *the vehicle shall be equipped with lights and sirens*.

(Emphasis added).

a. The police vehicle must be equipped with a siren

An express element of the eluding statute requires evidence that the pursuing vehicle shall have lights and sirens. The term "shall" in a statute is mandatory unless contrary legislative intent is apparent. *State v.*

Krall, 125 Wash.2d 146, 148, 881 P.2d 1040 (1994). In construing a statute as a whole, a reviewing court gives meaning to all of its words. *State v. Gilbert*, 68 Wash.App. 379, 382, 842 P.2d 1029 (1993). Criminal statutes are strictly construed *Gilbert*, 68 Wash.App. at 383, 842 P.2d 1029.

The requirement that the vehicle be equipped with both lights and a siren is not superfluous language; the legislature specifically amended the statute to make those required elements. The 1983 eluding statute was amended in 2003. LAWS OF 2003, ch. 101, § 1. The legislature made several amendments, including replacement of the words “appropriately marked showing it to be an official police vehicle” with the phrase “equipped with lights and sirens”.

The legislature's 2003 amendment added “equipped with lights and sirens.” And we must assume that it did so for a reason.

State v. Naillieux, 158 Wash.App. 630, 241 P.3d 1280 (2010) (citing *State v. Lynn*, 67 Wash.App. 339, 342–46, 835 P.2d 251 (1992)).

The State urges the court to rule that the evidence is sufficient to support an inference that Sgt. Hollis' vehicle had a siren. Brief of Respondent at 32-33.

In reviewing a challenge to the sufficiency of the evidence, the Court views all facts and reasonable inferences in the light most favorable

to the State and most strongly against the appellant to determine whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Sgt. Hollis' testimony that he was in a police vehicle, without more evidence, is insufficient to permit a rational trier of fact to infer beyond a reasonable doubt that the vehicle was equipped with a siren. The State argues that Sgt. Hollis' vehicle was "fully equipped" and asks the court to infer that it had the statutorily mandated equipment including a siren. Respondent's Brief at 32-33. By way of analogy, cases involving challenges to attempted eluding of a pursuing police vehicle in which the State attempted to prove the express element of whether the officer was in uniform in the absence of sufficient evidence are instructive. Divisions One and Three of this Court have held that evidence that an officer was on duty and in a marked police vehicle, without more, is insufficient to allow a rational jury to infer the officer was in a uniform. *State v. Hudson*, 85 Wash.App. 401, 405, 932 P.2d 714 (1997); *State v. Fussell*, 84 Wash.App. 126, 128-29, 925 P.2d 642 (1996). In *Hudson*, the officers were in a marked patrol vehicle which had its emergency lights and siren activated, but the Court held that this evidence was insufficient to prove that the officers were wearing uniforms. 85 Wn.App. at 404-05. In *Fussell*, the Court held that, while it is reasonable to infer that the defendant knew individuals in a marked patrol car with activated

emergency equipment were police officers, it is not reasonable to infer the officers were in uniform. 84 Wn.App. at 128–29.

Washington cases have consistently held that where officers are on duty in marked patrol vehicles, the evidence may nevertheless be insufficient to allow an inference, without further evidence, that the officer was in uniform. Although it may seem reasonable to infer that an on-duty officer in a marked patrol car was wearing a uniform, Washington courts have found that neither the fact that deputies were on duty in marked car nor even that a defendant realized deputies were law enforcement officers, without more, was sufficient to permit a rational trier of fact to infer an essential element of crime that officer is in uniform. See, *Fussell*, *id.* at 128-29. In this case, it is an even weaker argument that it must be inferred that the vehicle had a siren, without supporting evidence, other than the assertion that the vehicle was “new” and that it was “quite an Explorer.” RP at 305. Applying the reasoning of *Fussell* and *Hudson* to the evidence presented, this Court should hold that in this cases the State's evidence is insufficient to permit a rational trier of fact to infer the essential element of the crime that the police vehicle was equipped with a siren.

b. Sgt. Hollis was not in pursuit before Vines' vehicle became stuck

The statute in question does not define “pursuing” or its variant, “pursuit.” The definitions supplied by Vines, however, all require an element of “chase” or to “follow.” For instance, in the pertinent part of Black's Law Dictionary, the definition of “pursue” is “[t]o follow, prosecute, or enforce a matter judicially, as a complaining party.” The definition, in the same dictionary, of “pursuit,” is “[t]he act of chasing to overtake or apprehend,” Black's Law Dictionary, 1237, 1356 (6th ed. 1990). A similar definition of pursuing is carried by the Merriam–Webster Dictionary Online: “1: to follow in order to overtake, capture, kill, or defeat[,] 2: to find or employ measures to obtain or accomplish : seek pursue a goal[,] 3 to proceed along pursues a northern course.” Merriam–Webster Dictionary online, available at <https://www.merriam-webster.com/dictionary/pursuing>.

The American Heritage College Dictionary 1112 (3rd ed.1997), defines “pursue” as “1. To follow in an effort to overtake or capture; chase [,]” and “pursuit,” in part, as “[t]he act or an instance of chasing or pursuing.”

The State’s responsive brief offers no definition of “pursuit” but instead appears to argue that Sgt. Hollis was in “pursuit” of Vines when Vines’ Camry and Sgt. Hollis’ vehicles were heading toward each other on the driveway before stopping. Respondent’s Brief at 31. This argument is

contrary to the plain meaning of “pursuit”, as argued by the appellant, which is that pursuit *a priori* requires an attempt to chase or overtake the vehicle being pursued. Any pursuit would necessarily start only *after* Vines began reversing his car after his vehicle and Sgt. Hollis’ vehicle both stopped nose to nose on the driveway. Sgt. Hollis was getting ready to get out of the Explorer before Vines began reversing away from the Explorer. RP at 322. The record does not show that Sgt. Hollis began moving his vehicle to follow or pursue Vines prior to the time that Vines got stuck backing away on the driveway, which occurred either “a few seconds,” or “five seconds” after Vines backed away. RP at 321-22. Washington law suggests, at the very least, some degree of movement by the police vehicle to constitute attempted eluding. See e.g., *State v. Treat*, 109 Wash.App. 419, 35 P.3d 1192 (2001) in which Division Three noted “[W]hile the eluding statute requires that the defendant elude a ‘pursuing police vehicle,’ it does not require that the police vehicle remain moving at all times.” *Treat*, 109 Wn.App. at 427.

The necessity of movement by the police vehicle during at least part of the incident in order to constitute “pursuit” makes sense. Without some degree of movement, passing a stationary police vehicle on the side of the road in which the officer merely turned on his lights or siren without actually following the suspect vehicle would result in an attempt to elude,

clearly an absurd reading the statute.

Because the evidence is insufficient as a matter of law to prove the vehicle had a siren and that it was “pursuing” Vines’ vehicle before the latter vehicle became stuck, the evidence is insufficient to support the jury’s verdict. This Court must reverse Vines’ conviction and remand with directions that the trial court dismiss the charge with prejudice. *State v. Hickman*, 135 Wash.2d 97, 103, 954 P.2d 900 (1998) (“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” (citing *State v. Hardesty*, 129 Wash.2d 303, 309, 915 P.2d 1080 (1996))).

B. CONCLUSION

For the reasons stated herein, and in appellant’s opening brief, the appellant respectfully requests this Court to reverse the conviction.

DATED: February 26, 2018.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

PETER B. TILLER-WSBA 20835
Of Attorneys for James Vines

CERTIFICATE OF SERVICE

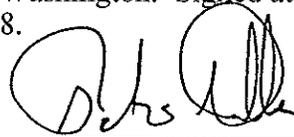
The undersigned certifies that on February 26, 2018, that this Reply Brief of Appellant was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Jesse Espinoza, Clallam County Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 26, 2018.



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