

ORIG

No. 290221

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent

v.

PAUL RODRIGUEZ, Appellant

---

APPEAL FROM THE SUPERIOR COURT  
OF GRANT COUNTY  
THE HONORABLE EVAN E. SPERLINE

---

OPENING BRIEF OF APPELLANT

---

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## I. ASSIGNMENTS OF ERROR

- A. The State failed to prove all the necessary elements of the crime of attempting to elude a police vehicle required by RCW 46.61.024.
- B. The trial court erred in allowing witness opinion testimony that Mr. Rodriguez was attempting to elude the police vehicle. (RP 140,145,166,169-170).
- C. There was insufficient evidence to find Rodriguez guilty beyond a reasonable doubt of unlawful possession of a firearm in the first degree.

### *Issues Pertaining to Assignments of Error*

1. Did the State fail to prove an express element of the crime of attempting to elude a police vehicle when it failed to present evidence that the officer was in uniform, requiring a reversal of conviction? RCW 46.61.024
2. Did the trial court erroneously permit a police officer to testify as to Mr. Rodriguez's state of mind, violating his constitutional right to a jury trial under both the federal and state constitution?

3. Was the State's evidence insufficient to uphold Rodriguez's conviction for unlawful possession of a firearm?

## II. STATEMENT OF FACTS

Paul Rodriguez was found guilty of attempting to elude a police vehicle and unlawful possession of a firearm in a jury trial. (CP 27, 28). The defense stipulated to making a false or misleading statement to a public servant, possession of less than 40 grams of marijuana, and driving without a valid operator's license. (RP 4-7).

At trial, the State presented the following evidence. Sergeant Jones of the Moses Lake police department was on duty on February 27, 2009. The mayor of Moses Lake was with him for a "ride-along" in a patrol car, equipped with window lights and a siren. (RP 89,136,138).

Mr. Rodriguez was in a Cadillac on Barbara Street. Sgt. Jones, traveling westbound on Broadway, noticed the Cadillac stopped about 30-40 feet back from the intersection. (RP 139). There were no cars behind or around it. (RP 109). Mr. Rodriguez appeared to be fidgeting with something on the seat of the car, possibly lighting

a cigarette. There was a female passenger in the Cadillac. (RP 91, 222).

Sgt. Jones turned onto Barbara Street. He slowed the patrol car to one to two miles an hour and drew parallel to the Cadillac. (RP 139). Mr. Rodriguez looked startled when he saw the officer, then turned his head and drove forward on the roadway. (RP 139). As Rodriguez drove forward he was not exceeding the speed limit, but Sgt. Jones testified, "It appears that he was intending to get away from me." (RP 140, 145).

Sgt. Jones made a U-turn as the Cadillac continued to move toward the intersection. By the time the patrol car reached the intersection, the Cadillac was several blocks beyond it. (RP 93). The Cadillac had accelerated but not exceeded the speed limit for the road. (RP 145). The Cadillac continued to accelerate, reaching up to 70 miles an hour in a 40 mile an hour zone. Sgt. Jones testified, "I was attempting to close the distance between our vehicles to catch up to him to at least get a license plate and then to activate my lights". (RP 165). He further testified, "It was trying to get away from me at a high rate of speed." (RP 166).

The patrol car was approximately 200 yards behind as the Cadillac approached another intersection, braked and turned,

cutting off oncoming traffic. (RP 166). The officer did not activate the lights or sirens until his patrol car approached that intersection. (RP 167). The following exchange occurred during direct examination of Sgt. Jones:

Q. Okay. And in this case here, do you recall when you turned that [patrol video cam] on?

A. Yes. As soon as I saw the actions of the Cadillac, he was no longer just trying to speed away from me, he was actively trying to elude me, and putting other people in danger.

MR. COLLINS [Defense counsel]: Your Honor, I'm going to object to the speculation as to what was in the state of mind of my client during this. I don't know that the officer can make that legal conclusion.

THE COURT: While it's not appropriate for a witness to speculate about someone else's state of mind, I did not hear sufficiently the answer to be able to rule on your objection. So I'll note that principle and overrule the objection. (RP 169-170).

The officer observed a black bag thrown out through the driver's side window to the road. (RP 174). The ride-along passenger in the patrol car did not see anything tossed out the window, as he was retrieving his water bottle from the floor of the car at that

second. (RP 100-101). Sgt. Jones radioed for other patrol cars to go to the area and look for the black bag. (RP 175).

The sergeant discontinued the pursuit in a residential area, turning off the emergency lights and siren. He then observed the Cadillac farther ahead turning into a trailer park. (RP 180-181). Sgt. Jones drove into the trailer park and saw Mr. Rodriguez step out from behind a trailer. (RP 181).

Sgt. Jones engaged in a foot pursuit of both Mr. Rodriguez and the female passenger. He took Mr. Rodriguez into custody. (RP186). The female passenger was eventually interviewed, however, Jones testified, "I received a name, but I could not verify whether or not that person had been involved." (RP 187). The Cadillac was later discovered as registered to Mr. Rodriguez's grandfather. (RP 225).

A black zippered canvas Adidas bag was recovered from under the front passenger side of a vehicle parked on the street in the area Sgt. Jones had indicated over the radio. (RP 45-57). It contained a gun and some marijuana. (RP 59,159, 160). A small ring and a baggie containing novelty women's jewelry were recovered from the front lawn of a home in the same vicinity. (RP 118, 123). No identifiable fingerprints were found on the weapon or

the ammunition. (RP 74). A detective ran the serial number of the weapon to determine if it had been reported stolen. (RP 57).

Instruction No. 4 given to the jury was as follows:

To convict the defendant of the crime of unlawful possession of a firearm in the first degree as charged in Count 1, the State must prove each of the following elements beyond a reasonable doubt:

1. That on or about February 27, 2009 the defendant knowingly had a firearm in his possession or control;
2. That the defendant had previously been convicted of a serious offense; and
3. That the possession or control of the firearm occurred in the State of Washington.

Instruction No. 6 given to the jury was as follows:

To convict the defendant of attempting to elude a pursuing police vehicle as charged in Count 2, the State must prove each of the following elements of the crime beyond a reasonable doubt:

1. That on or about February 27, 2009, 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.

Mr. Rodriguez was found guilty on both counts and sentenced to a total confinement of 101 months, with no community custody. (CP 39, 41). This timely appeal follows. (CP 54-55).

### III. ARGUMENT

1. The State Failed To Prove All The Necessary Elements Of The Crime Of Attempting To Elude A Police Vehicle Required By RCW 46.61.024 (1).

In a challenge to the sufficiency of the evidence, the test is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In considering a defendant's claim of insufficient evidence, the court accepts the State's evidence and draws all reasonable inferences from the evidence in favor of the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The State bears the burden of proving all elements of a crime beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

RCW 46.61.024 (1) provides:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his 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].

The crime of eluding requires proof that (1) a ***uniformed*** officer in a marked vehicle gives a signal to stop, (2) a driver willfully fails or refuses to stop, and (3) drives in a reckless manner while attempting to elude the police vehicle. See *State v. Hudson*, 85 Wn.App. 401, 932 P.2d 714 (1997). It is an express element of the crime of attempting to elude that the officer must be in uniform. *State v. Stayton*, 39 Wn.App. 46, 49, 691 P.2d 596 (1984), *rev. denied*, 103 Wn.2d 1026 (1985).

In *Hudson*, the defendant admitted he ran stop signs, traveled along train tracks, went through the front lawn of a residence, and heard officers say “Stop” and “Police”. *Hudson*, 85 Wn.App. at 404. The Court held that despite evidence the officers were in a marked vehicle and the defendant probably knew they were officers, failure to present evidence officers were in uniform required reversal of the conviction. *Hudson* at 405.

Similarly, this Court held evidence was insufficient to support a conviction for attempting to elude in *State v. Fussell*, 84 Wn.App. 126, 925 P.2d 642 (1996). There, deputies testified they activated patrol car lights and sirens after seeing Fussell’s vehicle traveling at speeds in excess of 100 miles per hour. *Fussell* at 128. Fussell challenged the sufficiency of the evidence on the issue of whether

the evidence presented would permit the court to infer he was signaled to stop by a uniformed officer. *Fussell* at 128. The Court reasoned “neither the fact the deputies were on duty in a marked patrol car, nor evidence Mr. Fussell and his passenger realized the deputies were law enforcement officers, without more, is sufficient to permit a rational trier of fact to infer, beyond a reasonable doubt, that either deputy was in uniform.” *Fussell* at 129. Because the evidence failed to substantiate the charge, the case was dismissed.

Here, the State presented no evidence Sgt. Jones was in uniform on February 27, 2009. Like *Hudson* and *Fussell*, this court must find that because the State did not present evidence the officer was in uniform. It failed to prove Rodriguez’s guilt beyond a reasonable doubt. His conviction for attempting to elude must be reversed and the charge dismissed.

2. The Trial Court Erroneously Permitted A Police Officer To Testify As To Mr. Rodriguez’s State Of Mind, Violating His Constitutional Right To a Jury Trial Under Both The Federal and State Constitution.

A trial court’s decision to admit or exclude testimony is reviewed for an abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). However, it is well-settled law that

no witness may testify as to an opinion on the guilt of a defendant, either directly or inferentially. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). The expression of such an opinion may constitute reversible error because it violates the defendant's constitutional right to a trial by an impartial jury, which includes the independent determination of the facts by the jury. United States Const. amend. 6; Washington State Const. art. 1, §§ 21, 22; *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Opinions as to the guilt of a defendant or the *intent* of an accused are inappropriate opinion testimony in criminal trials. *State v. Montgomery*, 163 Wn.2d 577, 183 p.3d 267 (2008); *Demery*, 144 W.2d at 759; *State v. Farr-Lenzini*, 93 Wn.App. 453, 463, 970 P.2d 313 (1999). Moreover, an opinion as to a defendant's guilt is particularly prejudicial when a government official, such as a law enforcement officer, expresses it. *State v. Thompson*, 90 Wn.App. 41, 46, 950 P.2d 977, *rev. denied*, 136 Wn.2d 1002 (1998).

The court reversed a conviction for attempt to elude a police officer because the officer's opinion testimony as to the driver's state of mind constituted harmful error. *Farr-Lenzini*, 93 Wn.App. at 456. There, the trooper followed a speeding vehicle with the patrol car siren and overhead lights activated. The car continued

speeding, driving erratically, and ran a stop sign. *Farr-Lenzini* at 457. The trooper testified, “It exhibited to me that the person driving that vehicle was attempting to get away from me and knew I was back there and refusing to stop.” *Farr-Lenzini* at 458.

The court found that although the trooper had participated in 50-80 arrests for attempting to elude and was qualified as an expert witness in police procedures, he was *not* qualified to testify as an expert on the driver’s state of mind or intent. *Farr-Lenzini* at 461. The Court also found his opinion was not helpful to the jury, as a jury, relying on its own experience was capable of deciding whether a driver was attempting to elude. *Farr-Lenzini* at 462.

Similarly, here Sgt. Jones gave his opinion about Mr. Rodriguez’s state of mind three different times. He testified that he slowly passed Mr. Rodriguez on the roadway, and made a U-turn to further investigate. (RP 140). Mr. Rodriguez accelerated his vehicle and moved forward. Although Sgt. Jones had not activated the lights or sirens on the patrol vehicle, he testified, “It appears to me that he was *intending* to get away from me.” (RP 140).

As the Cadillac continued northbound Sgt. Jones stated he was trying to “close the distance between our vehicles to catch up to him to at least get a license plate and *then* to activate my lights.”

(RP 165). Again, although neither lights nor siren were activated, Jones was asked, "What was it [the Cadillac] doing?" He testified, "It was trying to get away from me at a high rate." (RP 166).

The sergeant testified he finally activated his lights and siren and, over defense objection, testified: "As soon as I saw the actions of the Cadillac, he was no longer just trying to speed away from me, he actively was trying to elude me, and putting people in danger." (RP 169-170).

The trial court here noted that while it was not appropriate for a witness to speculate as to someone else's state of mind, the court did not "sufficiently hear the answer to be able to rule" on the objection. "So I'll note that principle and overrule the objection." (RP 170).

A court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or its discretion is exercised for untenable reasons. *State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995). The trial court abused its discretion when it overruled the objection because it did not hear the witness's answer. Its decision to allow the opinion testimony was exercised for untenable reasons.

The Court provided the following during jury instructions:

Instruction No.3: Witnesses and Their Testimony:

Generally, witnesses are “fact” witnesses, “opinion” witnesses, or both. Fact witnesses testify to what they saw, heard or otherwise observed, while opinion witnesses express opinions in addition to their observations. “Opinion” or “expert” witnesses are usually people who are qualified to give their opinions by experience, training or education in a particular field. (CP 20).

Like *Farr-Lenzini*, this court must find such opinion testimony was clearly outside the scope of Sgt. Jones’ expertise. He had participated in 20-25 eluding chases and could properly testify about what he *observed*, but he was not qualified to give an opinion as to Mr. Rodriguez’s *intent*. (RP 175); *Montgomery*, 163 Wn.2d 577; *Farr-Lenzini*, at 461. As the court in *Farr-Lenzini* held, a lay jury is capable of interpreting the defendant’s actions on its own without the aid of an expert opinion. *Farr-Lenzini*, at 462. The error here was not harmless and requires reversal of the conviction. *Farr-Lenzini*, at 456.

3. The State’s Evidence Was Insufficient To Uphold A Conviction For Unlawful Possession of a Firearm In The First Degree.

Sufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal. *State v. Baeza*,

100 Wn.2d 487,488, 670 P.2d 646 (1983). Due process requires the State provide sufficient evidence to prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358,90 S.Ct. 1068, 25 L.Ed. 368 (1970). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201 829, P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences which can reasonably be drawn. *Salinas*, 119 Wn.2d at 201.

The State charged Mr. Rodriguez with one count of unlawful possession of a firearm in the first degree, in violation of RCW 9.41.040(1)(a). (CP 1).

RCW 9.41.040(1)(a) provides:

A person whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree if the person owns, has in his possession, or has in his control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

To convict Mr. Rodriguez of this crime, the State was required to prove beyond a reasonable doubt that he possessed the firearm

and that such possession was knowing. *State v. Anderson*, 141 Wn.2d 357, 360, 5 P.3d 1247 (2000). Mr. Rodriguez contends the State failed to establish that he knowingly possessed the gun found in the black Adidas bag. Even though the bag was thrown from the window on the driver's side of the Cadillac, his mere proximity to the gun is insufficient to establish that he had knowledge there was a gun in the bag or had possession of it.

Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession requires physical custody of the item, while constructive possession occurs when one has dominion and control of the item. *Callahan* at 29. Whether an individual has dominion and control is evaluated by considering the totality of the circumstances. *State v. Partin*, 88 Wn.2d 889, 906, 567 P.2d 1136 (1977). There must be substantial evidence from which a jury can reasonably infer a defendant had dominion and control over the item. *State v. Collins*, 76 Wn.App. 496, 501, 886 P.2d 243, *rev. denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995).

In *State v. Summers*, the Court considered the line of cases dealing with possession and held that possession is more than passing control. *State v. Summers*, 107 Wn.App. 373, 386, 28

P.3d 780 (2002). “Momentary handling, without more, is insufficient to prove possession. But evidence of momentary handling, when combined with other evidence, such as dominion and control of the premises, or a motive to hide the item from police, is sufficient to prove possession. Finally, even passing control of contraband is not legal; it is merely insufficient to prove possession.” *Id.*

Here, Mr. Rodriguez was not the registered owner of the car he was driving. (RP 225). There was a female passenger riding in the Cadillac. (RP 187). Women’s jewelry was found in the black bag and on a lawn near the gun. (RP 63, 118, 123). Officers never determined whether the female was involved. (RP 222). No fingerprints were recovered from the gun or bullets. (RP 74). Although a deputy testified he ran the serial numbers on the gun to determine if it was stolen, no evidence was presented as to its owner or whether it had been stolen. (RP 57).

Even if Mr. Rodriguez had thrown the black bag containing the gun and jewelry, the State failed to present evidence he had actual or constructive possession. The passing control of the bag may not have been legal, but it was insufficient to prove possession.

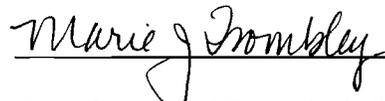
*Summers* at 387.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Rodriguez asks this court to reverse his convictions for attempting to elude a police vehicle and unlawful possession of a firearm.

Dated this 17th day of November, 2010.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Paul Rodriguez, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on November 17, 2010, to Paul Rodriguez, DOC # 789573, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001; Edward A. Owens, Grant County Prosecutor's Office, PO Box 37, Ephrata, WA 98823.

  
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