

FILED

OCT 08 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 30402-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

KORY LEO ZIELKE, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENT OF ERROR

A. The State's evidence was insufficient to support Kory Leo Zielke's convictions of possession of a stolen motor vehicle and attempting to elude.

Issue Pertaining to Assignment of Error

1. Was the evidence sufficient to support the convictions when the State failed to prove identity beyond a reasonable doubt? (Assignment of Error A).

II. STATEMENT OF THE CASE

Mr. Zielke was charged with one count of possession of a stolen motor vehicle and one count of attempting to elude. (CP 1). The case proceeded to jury trial.

Joshua Meckel was a full-time web designer for a company that sold parts for trucks and off-road vehicles. (10/17/11 RP 12). Cars were his passion. (*Id.* at 13). He had a chance of building his dream car, a Toyota Supra, so he bought one from his friend who had blown the motor. (*Id.* at 14). The car had been sitting in a wrecking yard for 9 months. (*Id.*). Mr. Meckel put a 1JZ engine with twin turbos in the Supra. (10/17/11 RP 14). It was powerful and he had the perfect car. (*Id.* at 14-16).

Around 11 p.m. on May 16, 2011, Mr. Meckel parked his Supra at his girlfriend's house. (10/17/11 RP 16). When he woke up, it was gone. (*Id.* at 17). When he reported it around 7:30 or 8 the next morning, Mr. Meckel was advised the car had already been transferred to the county or the Washington State Patrol (WSP). (*Id.* at 18). He got the car back about 9-10 days later. (*Id.* at 18).

His Supra was stripped and personal items were gone. (10/17/11 RP 18). Mr. Meckel neither knew Mr. Zielke nor gave him permission to take the car. (*Id.*). The Supra had body damage, with the driver's front side quarter panel 2-3 inches lower than the right. (*Id.* at 19). The door panels were ripped where the speakers had been pulled straight out. (*Id.* at 20-21). His Kenwood DVD player and MP3 were gone. (*Id.* at 23). An aluminum wheel was cracked, indicating serious impact. (*Id.* at 24). The Supra's frame was bent. (*Id.* at 25-26).

The car's interior was full of items that were not Mr. Meckel's. (10/17/11 RP 27). The stereo, including the wires, were in the back seat. (*Id.* at 28). The oil pan was damaged and the rear end got flattened. (*Id.* at 31).

WSP Trooper Mark Haas was on duty May 17, 2011. In uniform, he was driving a marked 2005 Crown Victoria patrol car on highway 2. (10/17/11 RP 34). Right by the Spokane International Airport exit, an approaching car caught his attention. (*Id.*). As the car made a left turn at the stop sign, it went broadside in traffic. (*Id.* at 35). As the trooper accelerated, so did the car he was pursuing. (*Id.*). It turned right on Russell Road with Trooper Haas following. (*Id.*). The trooper turned on his lights and activated the video system in the car. (*Id.*). The video turns on a minute before turning on the light bar. (*Id.*).

The car was completely out of sight when Trooper Haas turned onto Russell. (10/17/11 RP 36). After coming out of some S-curves, he saw the car about a ¼ to ½ mile ahead. (*Id.* at 37). The car was going over 100 mph. (*Id.*). The trooper felt it was dangerous and he was losing ground. (*Id.* at 37-38). The Supra stopped to the right so Trooper Haas slowed down. (*Id.* at 38). The driver made a U-turn and came straight at him. (*Id.* at 38-39). The trooper did not think the driver saw him. He went front bumper to front bumper with the Supra, which then took off in reverse. (*Id.*). Trooper Haas took after the Supra's driver, who was going 50 mph in reverse. (*Id.* at 39-40).

As they approached a T-intersection, the driver of the Supra locked up its brakes and did a “bat-turn,” that is, he spun around and faced the other way. (10/17/11 RP 40). The front end got stuck in a little ditch. (*Id.*). They were then side-by-side, with the Supra’s driver at the front passenger door. (*Id.*). The trooper looked Mr. Zielke right in the eye. (*Id.*). The Supra sped away when Trooper Haas opened the door to get out. (*Id.* at 41).

The Supra’s driver went back south on Russell toward highway 2. (10/17/11 RP 41). The trooper chased after him, but could not keep up. (*Id.*). He saw the Supra catch air over a hill and called off the pursuit because it was too dangerous. (*Id.* at 42). Trooper Haas turned off his lights and siren and discontinued the chase. (*Id.*).

When the Supra went airborne and over the top of the small hill, Trooper Haas said it went about 164 feet, 5 feet off the ground, and had to be going 118 mph. (10/17/11 RP 43). The car was sitting in the road with smoke billowing out of the engine compartment, the door open, and no one inside. (*Id.* at 43). A nearby resident heard the car and saw a guy running across his field back south. (*Id.* at 44).

The trooper's attention became focused on 605 S. Russell Road, the residence of Mr. Zielke's mother. (10/17/11 RP 44-45). Trooper Haas went to that address and heard the mother yelling at Mr. Zielke. (*Id.* at 45-46). The house was ¼ to ½ mile away from where the Supra was abandoned in the road and about 15 minutes had elapsed. (*Id.* at 46). Mr. Zielke subsequently came out of the house with no clothes on, a towel wrapped around him, and his hair wet. (*Id.* at 46-47). He said he just got out of the shower. (*Id.*). Trooper Haas recognized Mr. Zielke as the driver of the Supra. (*Id.* at 47). It looked like he had a broken nose. (*Id.*). The video of the pursuit was played for the jury. (*Id.* at 52).

Trooper Jerry Walker was working the morning of May 17, 2011. (10/17/11 RP 67). He responded to assist Trooper Haas. (*Id.* at 67). Looking for the Supra's driver, he said the search eventually focused on 605 S. Russell Road. (*Id.* at 67-68). A perimeter was set up around the house, but Mr. Zielke's mother drove right through the scene and went into the home. (*Id.* at 68-69). She was yelling at someone. (*Id.* at 69). Mr. Zielke came out and was arrested. (*Id.* at 69-70). Trooper Walker took him to jail. (*Id.* at 70). The State rested. (*Id.*).

Mr. Zielke testified in his own behalf. (10/17/11 RP 71). On May 17, 2011, his cousin woke him up at his apartment, 3228 E. Liberty, # 1, in Spokane. (*Id.* at 72). His cousin was supposed to take him to his mother's house to get his tools for work. (*Id.*). Mr. Zielke was a landscaper and pruner at Zip's. (*Id.*). He got to his mother's about 6:20 or 6:30 a.m. (*Id.* at 73). His cousin left as Mr. Zielke could just call his uncle to get a ride to work, but he never got the chance. (*Id.* at 74). Police officers were outside when his mother came into the house telling him not to do something stupid and to just go outside. (*Id.*). Mr. Zielke was in the middle of taking a shower. (*Id.*). He thought the officers were there because of a misdemeanor warrant. (*Id.* at 75). Mr. Zielke said his nose injury took place a couple of nights earlier. (*Id.* at 76).

Crystal Desantos, Mr. Zielke's aunt, saw him several days before May 17, 2011, and he had a messed-up nose. (10/18/11 RP 90). The defense rested. (*Id.* at 93).

At an earlier discussion regarding jury instructions, no exceptions or objections were taken to them. (10/18/11 RP 86). During deliberations, the jury sent an inquiry regarding the possibility of reaching a unanimous decision. (10/18/11 RP 136; CP 60). Both the State and the defense had no objection to the

court's resolution of the inquiry by talking to just the presiding juror and, without coercing them, asking the jury to try to reach a decision. (*Id.* at 138-39).

The jury found Mr. Zielke guilty of possession of a stolen motor vehicle and attempting to elude. (10/18/11 RP 140; CP 58, 59). The court imposed a standard range sentence. (CP 72). This appeal follows.

III. ARGUMENT

A. The evidence was insufficient to support the convictions because the State failed to prove identity beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). So viewed, the State's evidence still fell short of showing by the requisite quantum of proof that Mr. Zielke was the person who committed the crimes. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

The defense did not contest that someone stole a car and attempted to elude. (10/18/11 RP 120, 124). The question was the

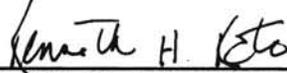
identity of the person who did so. (*Id.* at 119). Trooper Haas only had a fleeting glimpse of the Supra's driver. Yet somehow, the focus of the search for the driver turned to 605 S. Russell Road, which happened to be the home of Mr. Zielke's mother. There is nothing in the record to show that Trooper Haas was acquainted with Mr. Zielke or the reason why the search became 605 S. Russell Road. Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture by the jury. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In the circumstances here, the identity of the Supra's driver was indeed based on guess, speculation, or conjecture. The State's evidence was simply insufficient to prove the driver's identity beyond a reasonable doubt. Mr. Zielke's convictions must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Zielke respectfully urges this court to reverse his convictions and dismiss the charge.

DATED this 8th day of October, 2012.

Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on October 4, 2012, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Kory Leo Zielke, 3011 E. Columbia, # 2, Spokane, WA 99208; and by email, as agreed by counsel, on Mark E. Lindsey at kowens@spokanecounty.org.

