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Division III
State of Washington
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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

ERICKA HELLER,
also known as, ERICKA MCCANDLESS

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

1. The evidence is insufficient to sustain Ericka McCandless's convictions for Eluding and Hit and Run.

a. Standard of Review. The analytic formula for beyond a reasonable doubt has been stated in many hundreds of appellate courts at all levels. In *Jackson v. Virginia*, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 2787 (1979), the Supreme Court stated:

[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.

The *Jackson* Court also recognized: “ ... that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm.” 443 U.S. at 314, 99 S.Ct. at 2786, Citing; *Thompson v. Louisville*, 362 U.S.199, 80 S.Ct. 624 (1960).

Although 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 Wash.2d 842, 849, 72 P.3d 748 (2003), this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than

mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wash.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wash. App. 589, 592, 123 P.3d 891 (2005).

The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” *In re A.V.D.*, 62 Wash.App. 562, 568, 815 P.2d 277 (1991).

The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

b. Analysis. Again, the central factual issue in this case was who was driving the F-350. No one who testified saw Ericka McCandless drive the truck. There was also no forensic or other tangible evidence from which to conclude she was the driver.

None of the occupants of the truck testified during trial. Justin Alderson, and Amanda Milhouse were identified as witnesses for the

State. CP 30. Amanda Milhouse was even the subject of a material witness warrant. CP 85-86.¹

Dep. Ortiz testified that at the outset of the chase he was “clearly able to make out two and possibly three” heads within the truck. RP 66.

Victoria Brazell had an unobstructed front row seat to the chase as it was heading westbound, and then when it came to a dramatic end just outside the window of her booth at Denny’s. When she was interviewed by Dep. Palmer minutes later she positively identified Justin Alderson as the person who exited the driver’s door of the truck and tried to run away but was caught by Laslo. RP 246-247.

Justin Alderson was also identified as the driver by the deputies who arrived at scene at Pines and Sprague immediately after the chase ended. Deputy Knight who was in the back seat of Air One is heard to say that someone (Justin Alderson) exited the driver’s side of the truck as it was coming to a stop. RP 225.

Walgreen’s cashier, R’shelle Parkhurst was asked to come outside and identify Justin Alderson as the person who had purchased a pack of Camel cigarettes around the time of the chase. However, it was dark and

¹ The State indicates in its Motion in Limine that both Amanda Milhouse and Justin Alderson had felony convictions that would be admissible for impeachment purposes under ER 609(a). CP 33-34

she was looking across the street that was teeming with deputies. Then she was only asked if the person who was standing next to deputies in handcuffs was him. The deputies then made no effort to go back to the store to look at a cash register receipt or look at the security video to confirm the highly suggestive identification.

There is also nothing in the record about Justin Alderson having any cigarettes on him that were found in the search incident to his arrest or the search when he was booked into jail.

And, a pack of Camels was indeed found in the truck when it was searched. RP 209-210.

This Court should therefore resolve whether Ms. McCandless was the truck's driver, which is central to the issue of whether Ms. McCandless's convictions for the driving offenses satisfied due process.

Secondly, to convict Ms. McCandless of Hit and Run (Attended) the State had to prove beyond a reasonable doubt that she knew she was involved in an accident when Dep. Rassier's patrol car hit her during his unsuccessful Post PIT maneuver. *State v. Martin*, 73 Wash.2d 616, 625, 440 P.2d 429 (1968).

A person acts with knowledge when: (1) (s)he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (2) (s)he has information which would lead a reasonable man in the

same situation to believe that facts exist which are described by a statute defining the offense. *State v. Perebeynos*, 121 Wash.App. 189, 196, 87 P.3d 1216 (Div. 1, 2004), *Citing*, RCW 9A.08.010(1)(b).

Knowledge may be inferred from circumstantial evidence. If information is sufficient to cause a reasonable person in the same situation to believe that a fact exists, the trier of fact may infer that the respondent had knowledge. An appellate court will defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences. *Id* (cites omitted).

However, there is no evidence whatsoever, direct or circumstantial, that Ms. McCandless or the truck's driver were aware of Dep. Rassier's attempted Post PIT maneuver or any collision caused thereby. This was a high-speed chase and the F-350's driver was earnestly attempting to elude pursuing deputies. The truck attempted to slow down and turn right from Sprague to Herald, lost control, hit the curb, and stopped for an instant. Dep. Rassier attempted to hit the right rear tire of the truck to prevent it from moving, but the truck sped off and the chase continued in the same manner as before. There was simply no evidence admitted at trial that would sustain any rational inference that Ms. McCandless, or any of the occupants of the truck, knew an accident or collision with Dep. Rassier's vehicle had occurred.

The State cites Newton's three laws of motion as definitive proof that the defendant physically felt, heard, and/or saw the impact between the truck and the patrol car.² Leaving aside the issue of whether the State correctly described the three laws, Newton's laws were not part of this trial. There was no physicist that provided an expert opinion about the relevant masses, forces, or directions - or any other evidence whatsoever regarding any immutable laws of nature for the jury to consider.

Again, we are asking the reviewing court to look at the evidence and argument presented here and decide whether - under a deferential standard of review - there was evidence that proved beyond a reasonable doubt that Ms. McCandless was the driver and each and every element of Hit and Run (Attended).

2. The State violated Ms. McCandless's 6th Amendment right of confrontation by eliciting testimony from Cpl. Thurman about what Justin Alderson told him regarding his alibi, and Thurman's verification of the alibi.

a. Ms. McCandless preserved this issue for appeal. The defense filed a trial brief that was addressed by the court at the beginning of the trial. CP 71-74. The brief incorporated a motion in limine, requesting an advance ruling prohibiting "the introduction of out-of-court statements to law enforcement unless the declarant first testifies at trial."

² Respondent's brief at p. 11.

The defense cited evidence rules and case law regarding the defendant's 6th Amendment right to confront and cross examine all witnesses. The motion in limine also specifically names Justin Alderson as having made statements to officers and objects to any of these statements unless Alderson "has already testified, been subject to cross examination about the statement, and the prior statements fit a hearsay exception." CP 73-74.

The Court and the State conducted a colloquy regarding the motion to exclude any out-of court statements by Justin Alderson:

COURT: As to Defense Motion in Limine B, I understand this motion in limine to preclude the State from eliciting inadmissible hearsay testimony. I think it's a fair motion. There were statements made by witnesses in this case who their availability is either undetermined or unlikely, specifically The Defense provided detailed briefing on this issue, including Ms. Milhouse and Ms. -- Mr. Alderson.

THE COURT: The State doesn't have any dispute that those would be proffered-type testimonial statements?

MR. JOHNSON: That's right, Your Honor. I don't dispute that. Ms. McCandless has a right of confrontation as to these witnesses and introducing their statements as hearsay I agree would run contrary to our rules of evidence. And I will not be attempting to do so, and I will so advise my witnesses.

RP 17-18.

The Court's order in limine relieved defense counsel from having to object when the State elicited Mr. Alderson's statements and preserved the issues for review. See; *State v. Kelly*, 102 Wash.2d 188, 193, 685 P.2d

564 (1984); *Fenimore v. Drake Constr. Co.*, 87 Wash.2d 85, 91, 549 P.2d 483 (1984).

b. The trial court's curative instruction did not remedy the State's violation of the trial court's order barring out-of-court statements by Justin Alderson.

Following is the entire sequence of the State's questions and Cpl.

Thurman's testimony regarding statements made by Justin Alderson:

Q. All right. Once on the ground, can you describe the situation with Laslo and the male.

A. Yes. As soon as I approached up there to the male, he was -- I could see his hands. He was no longer a threat. I had Laslo release him. He was detained in handcuffs.

Q. The male, did he suffer any injury as a result of running from Laslo?

A. Minor dog-bite injury, yes, from taking him down.

Q. Okay. All right. Did you -- and without telling us anything about what the male said, did you have an opportunity to have a conversation with the male?

A. Yes, I did.

Q. Okay. Following your conversation with the male, did you go to Walgreens?

A. Yes, I did.

RP 165

...

DIRECT EXAMINATION (Resumed)

BY MR. JOHNSON:

Q. Good afternoon, Corporal Thurman.

A. Good afternoon.

Q. Before our lunch break you were testifying about this man who ran from the direction of the F350, the man who Laslo tracked and took down. And you told us that you spoke with him and then you went to Walgreens, found the store clerk and had her identify the man. Do you recall your testimony?

A. Yes, sir.

RP 169-170

...

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. Corporal Thurman, you contacted Justin Alderson, the man who ran away from the direction of the F350, and you had a conversation with him, correct?

A. That is correct.

Q. After the conversation you went to Walgreens. Did you go any other places, any other businesses other than Walgreens to try to confirm his alibi?

A. No, I did not.

Q. Okay. And why not?

A. Because I believed him and I had the --

MR. GRIFFIN: Objection, Your Honor.

THE COURT: Well, just one moment. Wait. Just one second. Just one second. Basis for the objection?

MR. GRIFFIN: Judge, I think he's commenting on the veracity of another potential witness in this case. I don't think it's proper. I would ask the Court to instruct the jury to disregard, please.

THE COURT: You may respond, Mr. Johnson.

MR. JOHNSON: I think as to that narrow objection, I understand the objection and I agree. I'll refocus my question.

THE COURT: All right. And the jury will disregard the prior question. Mr. Johnson will refocus -- restate.

BY MR. JOHNSON:

Q. And I'm not asking for a comment on credibility, but in terms of your investigation, were you satisfied that you had gone enough places to confirm the location of Justin Alderson during the time of this elude?

A. That is correct.

RP 178-179.

It is plainly obvious that by asking Cpl. Thurman if he went to any other businesses other than Walgreens to confirm Alderson's alibi, and Cpl. Thurman's answer, "No I did not," and, "I believed him," clearly conveyed to the jury that; (1) Alderson told Cpl. Thurman he had an alibi, proving he did not participate in the crime, [i.e.: that he was at Walgreens while the chase was happening], (2) verification of his alibi would be

found at Walgreens, and (3) Cpl. Thurman went to Walgreens and verified the truthfulness of Alderson's alibi.

Cpl. Thurman's testimony simply repeated what Alderson told him. Therefore, Cpl. Thurman was repeating hearsay in violation of the evidence rules, Ms. McCandless's right of confrontation, and the Court's order barring this testimony. Further, the violations were flagrant and not curable by a simple instruction to disregard. See *State v. Tarman*, 27 Wash.App. 645, 652, 621 P.2d 737 (Div. 3, 1980); citing *State v. Basford*, 76 Wash.2d 522, 457 P.2d 1010 (1969); other cites omitted.

3. The Hit and Run statute should not be applied where a person is hit by a pursuing police officer while that person is attempting to elude the officer.

Ms. McCandless repeats and incorporates the law and argument in her opening brief. The legislative goals underlying the Attempt to Elude and Hit and Run statutes are not furthered by charging both when the collision occurs during the eluding event.

Facilitating an accident investigation and providing immediate assistance to those injured is not implicated where the accident occurs during an active police chase and the attempt to elude fails when the perpetrator is caught. See, *Seattle v. Stokes*, 42 Wash. App. 498, 502, 712 P.2d 853 (1986); *State v. Vela*, 100 Wash.2d 636, 641, 673 P.2d 185 (1983).

Further, the crime of Attempt to Elude a Pursuing Police Vehicle adequately punishes fleeing motorists and protects the public, particularly with its 12-month enhancement if the eluding endangers someone besides the person attempting to elude and the pursuing officer.

4. The trial court erred by not designating how the credit for time served should be allocated between the Sentence for the felony and the consecutive sentence for the gross misdemeanors.

a. Number of days served prior to sentencing. Ms.

McCandless was booked into the Spokane County jail during the evening of November 2, 2016. She remained in jail continuously until her sentencing on April 14, 2017. However, the Judgment and Sentence was not filed until April 18, 2017.

The State is correct that there are 163 days from November 2, 2016 and April 14, 2017. There are 167 days from that date to April 18, 2017.

b. Allocation of credit for time served.

The State misunderstands Ms. McCandless's argument regarding credit for time served.³ The Petitioner agrees that the sentence for the felony conviction is served in State custody, and that the gross misdemeanors are served in the County Jail as stated in the Order Clarifying Judgment and Sentence. CP 195-196. The problem is that the

³ See Respondent's brief at 23-24.

judgment and sentence (CP 159-173) and order clarifying the judgment and sentence are both silent how the pre-sentence credit for time served was to be allocated between the felony Eluding sentence and the consecutive sentence for the Hit and Run and Obstructing gross misdemeanors. CP 164-65. This requires a remand to superior court to verify, and if necessary, correct the actual credit for time served, and then allocate the credit for time served between these sentences. See; 13B Wash.Prac., Criminal Law § 4201 (2017-2018), *Citing, State v. Besio*, 80 Wash.App. 426, 432 n.1, 907 P.2d 1220, 1223 n.1 (1995).

IV. CONCLUSION

For the reasons stated, this Court should reverse the convictions for Attempting to Elude (and the enhancement) and Hit and Run for lack of evidence and the State's violation Ms. McCandless's 6th Amendment right of confrontation. The Hit and Run charge should also be dismissed on grounds that the Hit and Run statute should not be applied as here, when the accident occurred with a pursuing patrol during an attempt to elude. In the alternative, if the Eluding conviction survives, this Court should merge the Obstructing charge into the Eluding charge. This case should be remanded to the superior court to calculate and allocate the pre-sentence credit for time served.

DATED this 14th day of April, 2018.

Respectfully submitted,



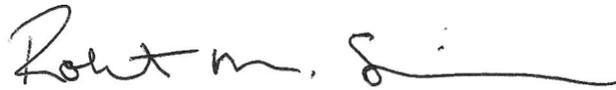
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CERTIFICATE OF SERVICE

I, Robert M. Seines, do hereby certify under penalty of perjury that on April 16, 2018, I provided service by email and USPS, a true and correct copy of the annexed Appellant's Opening Brief to:

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