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Court of Appeals
Division III
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35694-9-III

STATE OF WASHINGTON, Respondent,

v.

BENJAMIN CHARLES FISHER, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

A jury convicted Benjamin Fisher of attempting to elude a pursuing police vehicle and returned an affirmative verdict on the special allegation that his actions threatened one or more persons with physical injury. To support the enhancement, the State alleged that Fisher's two passengers could have been injured as the result of Fisher driving and making left turns at a high rate of speed, the same facts upon which it relied to argue that Fisher's driving was reckless as required to prove the attempting to elude charge. On appeal, Fisher contends that the evidence was insufficient to establish the enhancement because the State failed to prove any fact beyond the mere presence of third-parties in the vicinity of the chase, and mere presence in the vicinity of reckless driving does not automatically establish a threat of physical injury.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Insufficient evidence supports the special verdict for endangering others while eluding a police officer.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the legislature intended to require proof of specific risk of danger to individuals to sustain a sentencing enhancement for the endangerment enhancement.

ISSUE NO. 2: Whether proof of mere presence of third-parties during an attempt to elude police meets the State's burden to prove that they were threatened with physical harm or injury as a result of the defendant's conduct.

IV. STATEMENT OF THE CASE

On the night of April 29, 2017, Spokane County Sheriff's deputy Michael Keys was on patrol in a marked law enforcement vehicle when he saw a vehicle make a turn without using its signal. RP 63-64, 71, 72, 74, 75. He also did not see a license plate on the vehicle.¹ RP 75. Keys stopped the vehicle and saw three people inside. RP 77, 78. The driver, who was later identified as Benjamin Fisher, gave the police another name and birthdate. RP 79. Keys was able to pull up a photograph based upon the information provided and did not believe it matched the driver due to age and size differences. RP 79, 80. When he then re-approached the

¹ Keys later realized the car had a temporary permit. RP 104.

vehicle and asked the driver to step out, the driver drove off at a high rate of speed, squealing the tires. RP 80.

Keys pursued and saw the car make a fast left turn while cutting a corner, without its lights on. RP 81, 86, 87. He estimated the car was going about 45 miles per hour in a 25 mile per hour zone, but acknowledged he could have been about 10 miles per hour off. RP 85, 86. The car made another left turn onto a street where vehicles were parked. RP 88. About nine blocks from the initial stop, the vehicle stopped in a private driveway and all of the occupants got out and ran. RP 90, 92, 96.

A K9 team responded and tracked the driver. RP 113-14, 118, 120, 125. The dog eventually traced the scent into a homeowner's backyard behind a locked fence. RP 126-27. Proceeding under a deck, the dog contacted a man who struggled and then surrendered, and was taken into custody without further incident. RP 128-29. Police later confirmed that Fisher had a warrant for his arrest out of Idaho. RP 95.

The State charged Fisher with attempting to elude a police officer and added an enhancement pursuant to RCW 9.94A.834 that one or more persons other than the defendant and pursuing law enforcement officers were threatened with physical injury or harm during the pursuit. CP 4. The State argued that the two passengers in the vehicle were endangered

by Fisher's driving, and suggested it met its burden if the jury found that they could have been injured or felt any kind of physical pain "if something had happened that night." RP 193-94. The jury convicted Fisher as charged, and the trial court sentenced him to a prison-based drug offender sentencing alternative, which included an additional twelve months plus one day added to the standard-range sentence as a result of the sentence enhancement. CP 66, 68, 88; RP 227.

Fisher now appeals, and has been found indigent for that purpose. CP 102, 104.

V. ARGUMENT

On appeal, Fisher contends that insufficient evidence supports the sentence enhancement that his conduct threatened one or more persons with physical harm. There was no evidence that the vehicle lost control or created a risk of harm that differed in any way from the ordinary harm incident to driving recklessly that is required to prove the charge of eluding. Under such a broad reading of the enhancement statute, the enhancement could be charged anytime a third party is present in the vicinity of the chase. Because the purpose of a sentence enhancement is to provide additional punishment as the result of facts that elevate the crime beyond the bare facts necessary to prove the conviction, some heightened

threat to others beyond reckless driving must be established to support the enhancement. In the absence of such facts here, the sentence enhancement should be stricken.

To prove the charge of eluding a pursuing police vehicle, the State must show that the driver willfully failed to stop and drove in a reckless manner while attempting to elude a pursuing police vehicle. RCW 46.61.024(1). The endangerment enhancement is established by RCW 9.94A.834(1), which reads:

The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

An affirmative finding on the enhancement causes an additional twelve months and one day to be added to the sentence. RCW 9.94A.533(11).

On appeal, Fisher contends that the endangerment enhancement must be interpreted to require proof of some danger beyond or in addition to the mere fact that the defendant drove in a reckless manner. Appellate courts review questions of statutory interpretation *de novo*, with the objective to determine and give effect to the legislature's intent. *State v.*

Conover, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). To accomplish this task, the court considers the plain language of the statute as well as its statutory context, including related provisions, amendments, and the overall statutory scheme. *Id.* If the statute has more than one reasonable interpretation in light of this examination, then the court applies the rule of lenity and adopts the statute in the manner favorable to the defendant. *Id.* at 711-12.

Sentencing enhancements, in general, provide additional penalties for crimes based upon proof of specific facts beyond those necessary to establish the base offense. *See In re Charles*, 135 Wn.2d 239, 253, 955 P.2d 798 (1988) (“An enhancement . . . is a statutorily-mandated increase to an offender's sentence range because of a specified factor in the commission of the offense.”). Thus, for example, when proving a criminal charge that requires proof of the use of a firearm such as first degree robbery, the firearm enhancement may not be applied to enhance the sentence. *State v. Workman*, 90 Wn.2d 443, 453-54, 584 P.2d 382 (1978) (*discussing Simpson v. U.S.*, 436 U.S. 6, 98 S. Ct. 909, 55 L. Ed. 2d 70 (1978)). This is because the legislature has already established the punishment for the specific misconduct in the criminal statute, which takes precedence over the more general enhancement statute when both are addressed to the same concern. *Id.* at 454. In addition, the rule of lenity

requires application of the interpretation favoring the defendant when there is ambiguity about the legislature's intentions. *Id.*

Here, the concern addressed by the eluding statute is the danger to persons or property posed by high speed chases. *State v. Malone*, 106 Wn.2d 607, 612, 724 P.2d 364 (1986). In *Malone*, the defendant drove after dark at a high rate of speed without his lights on and while straddling the centerline of the road, causing other vehicles to have to pull off the road to avoid being hit. *Id.* at 609. The *Malone* Court observed that the actions "threatened the lives of Washington citizens" and the dangers posed by such actions were the legislature's concern in adopting the eluding statute. *Id.* at 612. Thus, the eluding statute already addresses the concern that uninvolved persons in the wrong place at the wrong time are placed in danger by heedless efforts to escape the police.

This interpretation of the eluding statute is buttressed by the requirement that in addition to trying to evade the police, the driver must operate the vehicle in a reckless manner. Driving in a "reckless manner" means doing so "in a rash or heedless manner, indifferent to the consequences." *State v. Roggenkamp*, 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005). In other words, the driving must reflect a disregard for the rights, interests, and safety of others using the roadways. This

requirement presumes, then, that the kind of driving criminalized in the eluding statute is the type of high speed, high risk driving in which people could be hurt if they are in the wrong place at the wrong time.

The endangerment enhancement elevates the punishment when there is proof that another person besides the defendant and pursuing officers are actually endangered by the defendant's conduct. Being "endangered" is synonymous with being "threatened with physical injury or harm." *State v. Williams*, 178 Wn. App. 104, 108, 313 P.3d 470 (2013), review denied, 180 Wn.2d 1003 (2014). To "threaten" somebody is "to be a menace or source of danger" to that person. *Random House Dictionary* (2d ed. 2018), available online at <http://www.dictionary.com/browse/threatened> (last visited April 9, 2018). Proof that others are actually placed in danger, therefore, is necessary to establish the endangerment enhancement.

Under the State's interpretation, as it argued to the jury, this burden was met by establishing that there were passengers present in the car during the events in question. RP 193-94. But establishing actual danger by simply showing presence of a third-party is problematic for several reasons. First, barring eluding incidents on remote rural or mountain roads, nearly all cases will occur on roadways where other cars

are present, where there may be pedestrians, and/or where there may be people present in nearby buildings. If the endangerment enhancement could be applied in any situation where such persons are observed to be present, then the enhancement would be the rule rather than the exceptional circumstance. Had the legislature intended to broadly punish the majority of eluding incidents by capturing all of those in which a third-party is merely present, it would be far more logical for the legislature to simply increase the punishment for eluding incidents as a class and permit mitigation of the sentence upon affirmative proof from the defendant that no person was endangered as the result of the incident.

Second, if the endangerment enhancement can be imposed anytime a third-party is present, the question arises how close the person must be to be present and at risk. Hypothetical scenarios demonstrate the unworkability of a mere presence standard. Imagine if a driver proceeds at a high speed down a residential street during daylight hours and passes a pedestrian walking on the sidewalk. If the driver merely passes the pedestrian while speeding, can the enhancement be imposed? What if the passenger is turning a corner away from the car and hears it pass behind him? Would this be treated the same as a situation where the passenger stepped off the sidewalk to cross the street in front of the car and is narrowly missed? What if the pedestrian is walking down his own

driveway toward the sidewalk then the car passes – at what point does the pedestrian enter the “zone of danger” created by the defendant’s driving?

These examples seek to illustrate that proof of the endangerment enhancement requires proof of actual danger to a third-party as a nexus of *both* the person’s presence *and* the particular threat posed by the defendant’s driving. In other words, when a person is present but is not specifically endangered by the defendant’s driving in any way greater than the general endangerment that results anytime a defendant drives in a reckless manner, the endangerment enhancement is not proven.

Here, beyond the presence of passengers in Fisher’s vehicle, the State failed to present evidence of any specific danger they were in beyond the general risks that the car could crash due to Fisher driving in a reckless manner. While occurring at high speeds, the chase itself was short, ending after a few blocks, and there was no evidence of other vehicles encountered on the roadway or of any loss of control over Fisher’s vehicle. Additionally, although the State presented some inconsistent evidence about whether a car was parked where Fisher could have struck it, there was no evidence establishing how close Fisher came to striking it or whether it, like the passengers, was simply present in the area. RP 88, 134.

The State's evidence presented in this case fails to present a nexus between the driving behavior and a specific risk to the vehicle passengers. Because the endangerment enhancement statute should not be interpreted so broadly as to permit an increased sentence based solely upon the presence of third-parties, some specific proof of danger to the passengers resulting from the driving conduct was necessary to sustain the enhancements. The State has failed to meet this burden. Accordingly, the sentencing enhancement should be stricken and the case remanded for resentencing.

VI. CONCLUSION

For the foregoing reasons, Fisher respectfully request that the court STRIKE the endangerment enhancement and REMAND the case for resentencing on the base offense of attempting to elude a police officer.

RESPECTFULLY SUBMITTED this 9 day of April, 2018.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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c/o Rebecca Shrum, Idaho Dept. of Corrections
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And, pursuant to prior agreement of the parties, by e-mail to the following:

Brian Clayton O'Brien
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SCPAAppeals@spokanecounty.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 9 day of April, 2018 in Walla Walla, Washington.



Andrea Burkhardt

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