

FILED
Court of Appeals
Division III
State of Washington
6/25/2018 1:11 PM

NO. 35718-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL CONNORS,

Appellant.

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

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
THE EVIDENCE WAS INSUFFICIENT TO FIND CONNORS GUILTY OF ATTEMPTING TO ELUDE.....	4
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Dep't of Ecology v. Campbell & Gwinn, LLC
146 Wn.2d 1, 43 P.3d 4 (2002)..... 7, 9

State v. Fussell
84 Wn. App. 126, 925 P.2d 642 (1996)..... 5, 9

State v. Hudson
85 Wn. App. 401, 932 P.2d 714 (1997)..... 5, 9

State v. Hummel
196 Wn. App. 329, 383 P.3d 592 (2016)..... 4

State v. Kintz
169 Wn.2d 537, 238 P.3d 470 (2010)..... 7

State v. Pittman
185 Wn. App. 614, 341 P.3d 1024 (2015)..... 5, 7, 8

State v. Rich
184 Wn.2d 897, 365 P.3d 746 (2016)..... 4

State v. Sweany
162 Wn. App. 223, 256 P.3d 1230 (2011)
aff'd, 174 Wn.2d 909 (2012) 4

State v. Tvedt
153 Wn.2d 705, 107 P.3d 728 (2005)..... 9

State v. Weatherwax
188 Wn.2d 139, 392 P.3d 1054 (2017)..... 7, 9

FEDERAL CASES

In re Winship

397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 4

Jackson v. Virginia

443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... 4

United States v. Universal C.I.T. Credit Corp.

344 U.S. 218, 73 S. Ct. 227, 97 L. Ed. 260 (1952)..... 9

OTHER JURISDICTIONS

State v. Burnett

185 Or. App. 409, 60 P.3d 547 (2002)..... 8

State v. Montano

___ P.3d ___, No. A-1-CA-35275, 2018 WL 1577491, at *3
(N.M. Ct. App. Mar. 29, 2018)..... 8

RULES, STATUTES AND OTHER AUTHORITIES

RCW 46.61.024 4, 5

U.S. Const. amend. XIV 4

Const. art. I, § 3..... 4

Webster’s Third New International Dictionary 2498 (1993)..... 7

A. ASSIGNMENT OF ERROR

The evidence was insufficient to find appellant guilty of attempting to elude a pursuing police vehicle.

Issue Pertaining to Assignment of Error

A conviction for attempting to elude a pursuing police vehicle requires proof beyond a reasonable doubt that the person was signaled to stop by a uniformed police officer. Was the evidence of this element insufficient when the officer testified he was in plain clothes except for his marked police vest and badge?

B. STATEMENT OF THE CASE

Officer Scott Lesser, while working and wearing his police vest and badge, attempted to pull over a car with no license plates. RP 86, 88-89. When he turned to get a better look, the car sped off. RP 88. Lesser followed and activated his red and blue emergency lights. RP 90.

At the time, Lesser wore a “black external vest carrier” over his “normal clothes.” RP 86. He explained the vest has “all my normal duty gear” that would otherwise be on a belt. RP 86. The vest has a “Spokane Police” patch on the front and block letters that say “police” on the back. RP 86. He also wore a “drop-down style holster” and a “shiny silver Spokane police badge on the front of my leg.” RP 86. He described his vehicle as a “plain marked kind of goldish color Chevy Tahoe” with “red and blue LED

lights that flash in all four corners of the vehicle.” RP 87. The vehicle is also equipped with an emergency siren. RP 87.

He watched the car drive quickly down an alley and residential street, then pull out unsafely onto a busy arterial forcing other cars to slow or stop, then, at a busy intersection it went between two vehicles, only narrowly avoiding a collision. RP 91-93. Lesser turned on his siren. RP 93-94.

For a time, Lesser broke off pursuit because of the danger to the public, but he was able to follow the trail of dust behind the car. RP 95. When he reached the entrance to an apartment complex, he saw many agitated people. RP 97. Continuing into the complex, he found the car and could see appellant Michael Connors running. RP 99. Lesser testified Connors was the same man he had seen driving the car. RP 105.

While Lesser searched the area, another officer read Connors his Miranda rights. RP 106-09. Connors told Lesser, “I’ve gotten away with eluding before so I tried to run. Police only chase me a short distance usually and most of the time I get away.” RP 110. He also described how he “was pretty close when I swerved between two cars and almost wrecked.” RP 110. In the backpack that Connors asked police to retrieve for him, police found latex gloves similar to a glove found in the car. RP 111-12. The key in the car was stuck in the ignition and could not be removed. RP 79. The car was

also leaking red fluid. RP 74. The license plates and identification belonging to Shannon Clum were found under the driver's seat. RP 78.

Clum testified she reported her car stolen early in the morning of the day before this incident. RP 61. She had not given Connors or anyone else permission to drive it. RP 63. When police found it late the next day, it had new damage and was no longer operable. RP 63-64.

The prosecutor asked Clum her emotional reaction to the car being gone. RP 65. Defense counsel objected, but the court overruled the objection. RP 65. Clum responded, "It was my baby." RP 65. When asked how she felt when she saw it again, she described herself as "angry," and "shamed." RP 65.

The jury found Connors guilty of attempting to elude a pursuing police vehicle and possessing a stolen motor vehicle. CP 41, 43. The jury did not reach a verdict on the enhancement for endangering someone other than the driver and the police during the attempt to elude. CP 42. The court imposed concurrent sentences of confinement at the high end of the standard range. CP 108-10. Notice of appeal was timely filed. CP 121.

C. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO FIND CONNORS
GUILTY OF ATTEMPTING TO ELUDE.

No person may be convicted of attempting to elude a pursuing police officer unless the person has been signaled to stop by a police officer who is in uniform at the time. RCW 46.61.024. Connors' conviction should be reversed, because the officer who signaled him was in "normal clothes" supplemented with a police vest and his badge.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. Insufficiency of the evidence is an issue that may be raised for the first time on appeal. State v. Sweany, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011) aff'd, 174 Wn.2d 909 (2012). It is a legal issue that appellate courts review de novo. State v. Hummel, 196 Wn. App. 329, 352, 383 P.3d 592 (2016) (citing State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016)). The question before the appellate court is whether, after viewing the facts in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)

Washington law defines attempting to elude a police vehicle as applying to any driver who, after being given the signal to stop by a uniformed police officer in a marked police vehicle “willfully fails or refuses to immediately bring his or her vehicle to a stop.” RCW 46.61.024. By law, “The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.” RCW 46.61.024. The fact that the officer was in uniform is an essential element that must be proved beyond a reasonable doubt. See State v. Fussell, 84 Wn. App. 126, 128-29, 925 P.2d 642 (1996); see also State v. Pittman, 185 Wn. App. 614, 620, 341 P.3d 1024 (2015) (“The requirements in the second and third sentences that the signal be given by a police officer in uniform are also necessary to establish illegality and are thus essential elements”).

In Fussell, the evidence showed only that the deputies were on duty in a marked patrol car, and Mr. Fussell and his passenger both realized the deputies were law enforcement officers. Id. at 129. The court concluded this evidence was not sufficient to permit a rational trier of fact to find beyond a reasonable doubt that either deputy was in uniform. Id. The court reversed Fussell’s conviction for insufficient evidence and dismissed the case. Id.

The following year, the court came to virtually the same conclusion in State v. Hudson, 85 Wn. App. 401, 405, 932 P.2d 714 (1997). The court explained that it must give meaning to every word in the statute and the word

“shall” is mandatory. Id. at 403. The only evidence was that the officers were in a marked patrol car and Hudson heard them say “stop” and “police.” Id. at 404. The court held this was insufficient to meet the requirement that the officers must be in uniform, declaring, “Evidence that the officers were in a marked vehicle and that Hudson probably knew that they were police officers, without more, is insufficient to permit a rational trier of fact to infer beyond a reasonable doubt that these officers were in uniform.” Id. at 405. The court reversed and dismissed Hudson’s conviction for insufficient evidence. Id.

The same result should accrue here because the evidence did not show beyond a reasonable doubt that Lesser was in uniform. Lesser described his clothing as “normal clothes” with the exception of his vest. RP 86. The vest had one “Spokane Police” patch on the front and the word “police” in block letters on the back. RP 86. No evidence was submitted regarding the size of the patch or the lettering on the back. Lesser also wore his badge on the front of his leg and his firearm in a drop-down style holster. RP 86.

This evidence was insufficient. A vest is not a “uniform” within the common understanding of that term. A reasonable person would expect an officer “in uniform” to be wearing something more distinctive than “normal clothes” topped with a vest and a badge. Additionally, with the possible

exception of the patch, none of the items of clothing indicating he was a police officer would be visible as he was driving in a car.

No Washington case has defined the contours of what it means to be in uniform. The meaning of a statutory term is a legal question reviewed de novo. State v. Weatherwax, 188 Wn.2d 139, 148, 392 P.3d 1054 (2017). Statutory interpretation begins with the legislature’s intent as indicated by the plain language of the statute. Pittman, 185 Wn. App. at 620 (citing Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002)). The plain language meaning of non-technical terms is discerned from the dictionary definition. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010).

The dictionary defines “uniform” as “dress of a distinctive design or fashion adopted by or prescribed for members of a particular group (as an armed service, an order, or a social or work group) and serving as a means of identification.” Webster’s Third New International Dictionary 2498 (1993). Lesser’s vest was not a uniform under the common understanding of that term. Lesser himself described his clothing as “normal” except for the vest and the badge. RP 86. These two articles did not “serve as a means of identification” because markings identifying the vest as a police vest would have been largely to completely invisible while he was driving in a car.

Presumably, the uniform requirement is included in the statute so that drivers may in good conscience and without prosecution flee when pursued by someone who is, or may not be, a police officer. Oregon law has a similar requirement, and one court there noted the purpose of the uniform requirement is that it, “ensures that the person being pursued will know that he or she is in fact fleeing a police officer.” State v. Burnett, 185 Or. App. 409, 414, 60 P.3d 547 (2002). Permitting prosecution of a person chased by someone wearing only a vest, easily donned in a hurry or as a costume, does not serve the purpose of identifying the officer as a legitimate police officer from the perspective of a driver.

A recent New Mexico case rejected the idea that a holstered firearm and a badge amounts to a uniform because badges and guns are not articles of clothing. State v. Montano, ___ P.3d ___, No. A-1-CA-35275, 2018 WL 1577491, at *3 (N.M. Ct. App. Mar. 29, 2018). Therefore, the officer wearing them, but otherwise in plain clothes, was not “uniformed” for purposes of the statute prohibiting willful failure to stop after being signaled by a uniformed officer. Id. at *5.

At best, the term “uniform” is ambiguous as it pertains to an officer who is in plain clothes except for a vest and a badge. Where a statute is susceptible of multiple reasonable interpretations after the plain meaning analysis, it is ambiguous. Pittman, 185 Wn. App. at 620 (citing Dep’t of

Ecology, 146 Wn.2d at 9-12). Here, the term uniform could mean “full uniform,” as Connors suggests it must, or it could, as the State will likely argue, mean simply wearing any item of clothing that might identify a person as a police officer. Under this rationale, it could be seen as ambiguous, but that ambiguity also requires reversal of Connors’ conviction.

“Criminal statutes are strictly construed.” Hudson, 85 Wn. App. at 403. Moreover, the rule of lenity requires that, absent other indications of legislative intent, criminal statutes must be strictly construed in favor of the defendant. Weatherwax, 188 Wn.2d at 155. “[W]hen choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite.” State v. Tvedt, 153 Wn.2d 705, 710-11, 107 P.3d 728 (2005) (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 222, 73 S. Ct. 227, 97 L. Ed. 260 (1952)). Here, if the legislature had intended that any one item of distinctive clothing, whether visible or not, could constitute a uniform, it could have defined the term. Because the legislature did not do so, the term “uniform” should be construed strictly to mean a full uniform, not merely a vest worn over otherwise “normal clothes.”

The State may attempt to argue that Connors appears to have known his pursuer was a police officer. Under Hudson and Fussell, that is

immaterial. The law and due process prohibit criminal conviction except on proof beyond a reasonable doubt of every essential element, including that the signaling officer was in uniform. Hudson, 85 Wn. App. at 405; Fussell, 84 Wn. App. at 128-29. Because Lesser was not in uniform under a strict construction of the word, Connors' conviction for attempting to elude should be reversed and the case dismissed with prejudice. Id.

D. CONCLUSION

For the foregoing reasons, this Court should reverse Connors' conviction for attempting to elude with prejudice and remand with instructions to dismiss.

DATED this 25th day of June, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068
Office ID No. 91051
Attorney for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

June 25, 2018 - 1:11 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35718-0
Appellate Court Case Title: State of Washington v. Michael E. Connors
Superior Court Case Number: 17-1-02575-6

The following documents have been uploaded:

- 357180_Briefs_20180625131014D3819382_1527.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BOA 35718-0-III.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- sapaappeals@spokanecounty.org

Comments:

Copy mailed to: Michael Connors, 372298 Coyote Ridge Corrections Center PO Box 769 Connell, WA 98326

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jennifer J Sweigert - Email: SweigertJ@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20180625131014D3819382