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Court of Appeals
Division III
State of Washington
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NO. 35915-8-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

State of Washington,

Respondent / Plaintiff,

v.

MICHAEL CANEDY,

Appellant / Defendant.

Appeal From The Superior Court
Of Whitman County
Case No. 17-1-00236-38
The Honorable Gary Libey

BRIEF OF RESPONDENT

Denis P. Tracy, WSBA # 20383
Whitman County Prosecutor

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ER 701 10

I. DEFENDANT / APPELLANT'S ASSIGNMENT OF ERROR

The defendant argues

1. that his attorney was ineffective in not objecting to certain testimony regarding visual estimate of a car's speed; and
2. that his attorney was ineffective in his closing argument, when he allegedly misstated the law and lowered the burden of proof; and
3. that the Court of Appeals should not impose costs; and
4. that the Court of Appeals should order the \$200 filing fee that was imposed as part of the sentence be sticken.

The State believes the allegations of ineffective assistance of counsel are not correct, and agrees with defendant's positions regarding fees and costs.

II. STATEMENT OF THE CASE

October 28, 2017 at about 10:20pm, the Whitman County Sheriff's Office got a complaint about a car being driven erratically in the town of Rosalia, WA. (RP 18, 20) Deputy Jordan responded in his police car, a 2016 Ford Explorer, with high performance suspension, engine, and brakes. (RP 18)

Deputy Jordan had been a full time sheriff's deputy for six years, went through the basic academy, had many hours of on-going training in

police work, patrols the entire county on his shifts, responding to all kinds of calls. At the academy, he spent a week in a driver's course for police, and attends a refresher emergency vehicle operation course almost every year. (RP 15-17)

The deputy came into town with his window down so he could hear things. (RP 28) He found a car (being driven by the defendant) spinning in gravel near some storage sheds. As the deputy turned towards the car, the car spun around and began to accelerate away from the deputy. The defendant quickly got up to 50 mph, well over the speed limit. (RP 30) The speed limit is 25 mph. (RP 62) The deputy turned on his emergency lights to signal the car to pull over. The car turned its headlights off and continued very fast. (RP 30-31) The area was dark, gravel road, potholes, various things scattered in and around the roadway. (RP 31) The deputy was going about 50 mph and not overtaking the defendant. (RP 33)

In this dark, gravel, potholed road, there is a grain elevator, with a weigh scale, a catwalk for people to talk to the truck drivers on the scale, and a large 500 gallon propane tank. (RP 25, 34-36) The defendant drove in the narrow lane between the propane tank and catwalk on the one hand and the grain elevator building on the other, in the truck weigh scale lane,

without his headlights on, going well over 25 mph, going about 50 mph at the deputy's estimate. (RP 34-36)

The defendant took a turn at an intersection and drove over some railroad tracks. He bottomed out over the tracks, getting a couple of inches of air under his back tires. (RP 36-37) The heard it (window open) and saw it. (RP 37) The deputy estimated 80 mph, but agreed that was an estimate and defendant could have been going slower. He believed it was much faster than 30 mph. That was based on both his training as an officer and his experience as a driver. (RP 37-38)

The defendant "blew through" a stop sign at about 20 to 25 mph. (RP 38) There was an open tavern within one or two blocks. There were cars parked near the tavern, and pedestrians in the area. (RP 26, 38-39) The defendant made another turn and then pulled over. The defendant never turned his headlights back on. (RP 39-40)

On cross, the defense attorney asked the deputy about the speed estimates. The deputy testified that his estimate was 50 mph in the rough road area at the start of the pursuit, and 80 mph near the railroad tracks. (RP 42-44) The deputy admitted that he had told another deputy that the defendant had literally been going 100 mph, but that in reality the defendant had not gone 100 mph. (RP 45-46)

Grace Ashworth was a backseat passenger of defendant's. She testified that she was 16, from Rosalia, and did not yet have a driver's license, but had taken driver's ed and had driven with her learner's permit with her mother. She had experience driving in Rosalia and also on highways, both day and night. She knew the speed limit. (RP 62-64)

Before the deputy showed up, the defendant was speeding around, throwing up gravel with his tires. (RP 67) When the cop turned towards the defendant, the defendant began driving away and turned his headlights off. About the same time, the cop turned on his emergency lights. The defendant then sped on [away]. (RP 69) The defendant bottomed out over the railroad tracks. Ms. Ashworth told defendant to stop. Defendant didn't stop. (RP 71) Ms. Ashworth does have a sense of how fast 25 mph is, and how fast 50 mph is. She was able to estimate defendant's speed and said it was over 25 mph, she thought it was over 35 mph [but her testimony seemed less sure than over 25 mph], and when asked whether she thought defendant was going over 50 mph she said she was not exactly sure about that. (RP 72-73) On cross, she said defendant did not come close to going as fast as 80 mph. (RP 73)

The defense called Mr. William Millard as a witness. He was an older gentleman from the area who was familiar with the defendant's car – a 1992 Honda. (RP 90) Mr. Millard had worked on cars all his life,

including building and racing cars. (RP 91) He had worked on that car earlier that day. That car had a problem with acceleration. When it got up to 25 or 30 mph the engine would start to miss. Mr. Millard believed it had a problem with the fuel supply system, maybe a fuel filter problem. (RP 91-93) That day, he had been able to get the car up to 50 mph, but it took driving on a mile of straight level road to do it [explaining that it couldn't or wouldn't accelerate quickly]. (RP 93) Mr. Millard also testified that defendant was having problems with his headlight switch or wires. (RP 96)

On rebuttal, the deputy testified as follows:

“He said that he was having problems with his fuel filter in his Honda. He said it wasn't running very good and I told him that it seemed like it was running fine to me that night. He made the comment that when it's cold it does run sluggishly. After it warms up it runs nice though.” (RP 98)

Closing Argument:

In closing argument, the prosecutor reviewed some of the jury instructions with the jury, beginning with Instruction 1 “you are the sole judges of the credibility of the witnesses and what weight is to be given to each witness's testimony.” (RP 107) The prosecutor argued that if there was conflicting testimony from witnesses, that the jury should not stop

there and just they couldn't decide the case beyond a reasonable doubt, but instead, the jury should look to point of view, perspective, memory, etc and could decide to believe one witness over another. (RP 107)

The prosecutor reviewed the evidence of defendant's speed at RP 112, noting that the deputy said he himself was going about 50 mph and not overtaking the defendant. The prosecutor noted that the State had not proven any particular speed beyond a reasonable doubt, but that even going 30 to 35 mph in the dark, crowded narrow, pot-holed gravel drive area was reckless. (RP 112) The prosecutor goes on to argue about the recklessness of running the stop sign near the tavern where there are people about, without headlights, at 10:30 at night. (RP 113) The prosecutor ended its first closing by noting the speed, being about fifty as the deputy estimated, and then said "But here's the real issue, rash and heedless? Yeah." (RP 114)

Defense counsel began his closing by reviewing the part of Instruction number one regarding the jury as the sole judges of witness credibility, giving a different argument on the issue than the prosecutor had. "Now, you are the sole judges of the laws and facts. We did have different testimony among the witnesses. So, what do you do, right? Well that could be a reasonable doubt. It could very much be. You don't have to consider [inaudible]. You may consider those things that he [the

prosecutor] pointed out in judging the credibility of a witness. But, you alone are the judges of the facts. So, you don't have to consider anything other than your gut instinct [inaudible]. If you've got three witnesses who can't really agree on the basics here, that might be a reason to doubt. Very much so." (RP 114)

Defense counsel then emphasized the State's burden to prove "each and every element beyond a reasonable doubt." Emphasizing that numerous times. (RP 115 (three times))

Defense counsel ends his argument by asking each member of the jury to not surrender their honest belief about the evidence just to return a verdict. (RP 116-117) Don't "go along to get along." (RP 117) "...[M]ake the decision based on your strength, your feeling, your conviction, what you believe the evidence said to you. ... not guilty..." (RP 117)

The State's rebuttal closing was brief. In its entirety:

"I just want to say, no headlights. That's all I have."

III. ARGUMENT

Defense counsel was not ineffective. Since witnesses are allowed to give an opinion about a car's estimated speed, any objection would have been likely overruled and brought an emphasis that such testimony is specifically allowed by the court. Further, defense counsel may have wanted to try to show that the deputy was prone to exaggeration, lessening the deputy's credibility. As to defense counsel's closing argument, defense counsel in no way diminished, or argued to diminish, the State's burden of proof.

- 1 It was not ineffective for defense counsel to not object to opinion testimony about the defendant's speed.

As noted in defendant's brief, in a claim of ineffective assistance of counsel, the defendant has the burden to show 1) the attorney's performance was not objectively reasonable; and 2) there is a reasonable probability that but for the deficient performance, defendant would not have been convicted. State v. McFarland, 127 Wn.2d 322 (1995). Also as noted in defendant's brief, tactical decisions cannot serve as a basis for an ineffective assistance of counsel claim. State v. Grier, 171 Wn.2d 17, 33 (2011).

Here, defendant claims defense counsel should have objected to testimony about the estimate of defendant's speed. As noted in defendant's brief, defendant must show that the failure to object fell below prevailing professional norms, that the objection would have been sustained, that the defendant would not have been convicted if the objection had been sustained, and the decision was not a tactical one. State v. Sexsmith, 138 Wn.App. 497 (2007).

There are many cases that repeat: testimony expressing an opinion on the estimated speed of a vehicle is admissible. The applicable evidence rule is ER 701. For instance, in Clevenger v. Fonseca, 55 Wn.2d 25, 34-35 (1959)(overruled on other grounds in part by Danley v. Cooper, 62 Wn.2d 179 (1963), the court noted "that a lay witness may give his estimate of the speed of a moving vehicle by his own observation is a well-established rule of law. ... The objection goes to the weight rather than the admissibility of the testimony." (citations omitted). In Clevenger, the witness had only had a brief (three car lengths) observation of the vehicle, but was allowed to testify that the vehicle was going at "a great rate of speed." Id.

If one were to look back at cases before the internal combustion engine, one would find Sears v. Seattle Consol. St. Ry. Co., 6 Wash. 227 (1893), finding no error in the trial court allowing the testimony from a lay

witness as to the speed of a street car being too fast to stop before a crash. Or of a more recent vintage, State v. Kinard, 39 Wn.App. 871 (1985), as noted in defendant's brief, recognizes a witness need not be an expert to give an opinion of approximate speed of a vehicle.

In the case at bar, the deputy testified about driving his patrol car every day on patrol throughout Whitman County. He was specifically trained in emergency vehicle driving, and gets a refresher every year or so. He testified that he estimated his own speed to be about 50 mph, as was not overtaking the defendant. There simply was enough foundation for the court to allow that testimony. The defendant has not met his burden to show that the court would have sustained an objection to it.

In the case at bar, the State also laid enough foundation to allow Ms. Ashworth to give an estimate of how fast the car was going in which she was riding. In addition to being 16 years old, and having ridden in cars as a passenger, she had recently completed driver's ed, along with driving under her learner's permit with her mother. Her testimony that the car was going over 25 mph, and likely over 35 was not out of the realm of her ken. Again, the defendant has not met his burden to show that an objection to her estimate would have been sustained.

In addition, this is not just a case about speed. Even IF the defense met their burden to show an objection to speed estimate would have been

sustained, defendant would have to show that the outcome would have necessarily been different here. Given the dark, no headlights, very narrow and pot-holed road, with propane tank on the one side and a building on the other, defendant's driving was reckless. Driving through the stop sign, no headlights, with people nearby was reckless. The result would not have been different, even if there was no specific speed estimate.

In addition, for an ineffective assistance claim to succeed, the defendant must also establish that there could not have been a tactical reason for not objecting. Here, since such an objection was likely to be overruled, an objection would have only served to highlight for the jury the fact that the trial judge was allowing someone to give an estimate of the vehicle's speed and what that speed was. Defense counsel would not want to have that emphasized for the jury.

A further tactical reason to not object to the deputy's estimates of speed is that defense counsel may have wanted to try to show that the deputy was prone to exaggeration. At one point, the deputy estimates the speed as 80 mph, but then says it could have been much less. At another point, the deputy admits he told another deputy on scene that the defendant had been driving 100 mph, although he admits that he exaggerated when he was talking with that deputy. Defense counsel may

have wanted Ms. Ashworth to give her estimate, since it was generally less than the deputy's estimate. The defendant has not met his burden to show that there could not be a tactical reason to not object to the speed estimate testimony.

2. Defense counsel in no way diminished the State's burden of proof.

Context, as someone once said, is everything. When defense counsel's argument is taken in context it is clear that his comments about considering "gut instinct" is in reference to evaluating a witness' testimony. That is immediately followed by not less than three statements about the fact that the State must prove each and every element of the crime beyond a reasonable doubt, and pointing out some of the evidence that was in the defendant's favor. Then defense counsel makes an argument to any jurors would might hold out for a 'not guilty' position. He argues that such a decision should be kept to, with their "strength", their "feeling" and their "conviction" as to what the evidence "said to them" and not to just go along with a guilty verdict to get along with their fellow jurors. There is no belittling of the burden of proof. Far from it, when taken in context.

3. The State agrees that this Court should not impose costs on appeal.

4. The State agrees that, given the change in the law, the filing fee that was imposed in the sentence in this case should be stricken.

IV. CONCLUSION

Defense counsel was not ineffective. The witnesses who testified about estimates of the speed of the cars involved had enough experience in the wide world to give the estimates they gave. As such, any objection to the testimony would not have been sustained. In addition, even if such testimony was not allowed, the result would not have been different. There is ample other evidence upon which a jury would have convicted. Further, there were tactical reasons for defense counsel to not object to the testimony.

In addition, when taken in context, defense counsel's closing argument did not diminish the State's burden of proof.

The State respectfully requests the court deny the appeal and affirm the conviction, but the State agrees with the defense argument regarding fees and costs.

Respectfully submitted this 20 day of November, 2018.



Denis Tracy, WSBA 20383
Whitman County Prosecutor
Attorney for the State

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IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff,

Court of Appeals No. 359158
No. 17-1-00236-38

v.

AFFIDAVIT OF DELIVERY

MICHAEL CANEDY,
Defendant,

STATE OF WASHINGTON)
COUNTY OF WHITMAN)

AMANDA PELISSIER , being first duly sworn, deposes and says as follows: That on the 20TH DAY OF NOVEMBER, 2018, I caused to be delivered a full, true and correct copy(ies) of the original **BRIEF OF RESPONDENT** on file herein to the following named person(s) using the following indicated method:

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MAILED TO JILL S REUTER AT EASTERN WASHINGTON LAW APPELLATE, PO BOX 8302, SPOKANE, WA 99203

-MAILED TO MICHAEL CANEDY AT 116 SE AERIE ST, MALDEN, WA 99149

DATED this 20TH DAY OF NOVEMBER, 2018. Amanda Pelissier
AMANDA PELISSIER

SIGNED before me on the 20TH DAY OF NOVEMBER, 2018.



Denis P. Tracy
NOTARY PUBLIC in and for the State of
Washington, residing at: Oakesdale
My Appointment Expires: 03-09-2019

WHITMAN COUNTY PROSECUTOR'S OFFICE

November 20, 2018 - 12:08 PM

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