

FILED
Court of Appeals
Division III
State of Washington
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NO. 36284-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

ALYN JAMES SCHWINGE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00147-5

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Was the evidence produced at trial sufficient to show the essential elements that the officer who signaled the Defendant to stop was in uniform?
2. Should certain LFOs be stricken from the judgment and sentence?

B. STATEMENT OF THE CASE

In 2017 the Defendant, Alyn Schwinge, was charged with two counts of second degree assault with a domestic violence designation and a deadly weapon enhancement and attempting to elude a pursuing police vehicle. CP 37. The matter proceeded to a jury trial on April 18, 2018. RP 24.

The Defendant's ex-girlfriend, Kcarsidy Tyler, testified at trial that she had a child with the Defendant but that their relationship had ended at the end of September 2017. RP 33.

At trial Tyler testified an act of violence took place on the afternoon of September 27, 2017. RP 34, 36. According to Tyler, she was asleep in bed when she woke up to the Defendant "clicking his knife open and jumping on" her. RP 35. Tyler explained the Defendant then "held the knife up to [her] throat and [said] he was going to kill [her]." RP 35. The knife was described as a switchblade Gerber knife and was pushed upon the neck such that it broke Tyler's skin. RP 36-37. The act of aggression by the Defendant lasted several hours, in which Tyler testified she was unable to

leave because the Defendant had the car keys and her phone. RP 39. Eventually while the Defendant was distracted Tyler was able to get access to a phone and call her mother for help. RP 39-40.

Tyler testified her mother arrived shortly after and she followed her mother onto her adjacent property with the Defendant following. RP 42. After learning about the knife being used Tyler's mother called the police. RP 43.

Klickitat County Sheriff Officer Ed Gunnyon was the first to arrive on scene. RP 44, 72. Upon seeing Officer Gunnyon, the Defendant went to his car and sat in it. RP 91-92. As Officer Gunnyon approached the vehicle and attempted to make contact with the Defendant he started the car. RP 93. As Officer Gunnyon knocked on the window and directed the Defendant to turn off the car and talk to him, the Defendant expressed his unwillingness to talk about the matter. RP 93. When Officer Gunnyon attempted to open the car door he found it to be locked. RP 93. When Officer Gunnyon again attempted to order the Defendant to turn off the car and talk to him the Defendant took off in the car. RP 93-94. As another officer's vehicle attempted to block the Defendant from leaving, the Defendant evaded the car by using an alternate driveway. RP 77, 94. A police pursuit ensued, with the Officers utilizing lights and sirens. RP 95-96. Not long after the Defendant's car became high centered and after a foot chase, the Defendant was apprehended. RP 96-97.

According to Tyler, September 27, 2018 was not the first time she had suffered abuse at the hands of the Defendant. Tyler testified the Defendant had hit her previously with the knife. RP 45-49. Tyler testified that just a few days prior the Defendant had hit her on the head with the knife. RP 45-46. Approximately a week before the Defendant had hit Tyler on her hand drawing blood. RP 47. Photos presented at trial evidenced wounds on Tyler from the Defendant hitting her. RP 49-50. Photos also revealed bruising on the legs and other body parts of Tyler due to the Defendant. RP 51.

The Defendant was convicted on the first count of assault in addition to attempting to elude a police officer. RP 168, CP 68-70. The Defendant was acquitted on the second count of assault. RP 168, CP 68-70.

C. ARGUMENT

1. THE STATE CONCEDES THE EVIDENCE PRODUCED AT TRIAL DID NOT SPECIFICALLY SHOW THE TWO PATROL OFFICER'S WHO RESPONDED TO A 911 CALL, ARRIVED AT THE SCENE IN MARKED POLICE VEHICLES, ORDERED THE DEFENDANT TO STOP, ACTIVATED THEIR PATROL VEHICLE'S EMERGENCY LIGHTS WHILE GIVING CHASE AS THE DEFENDANT DROVE RECKLESSLY TO THE POINT OF HIGH CENTERING HIS VEHICLE AND THEN FLEEING ON FOOT WERE NOT WEARING POLICE UNIFORMS.

The State does not concede that the officers were not wearing uniforms, but it does appear that the State failed to elicit such testimony. As such, current caselaw dictates that the Defendant's conviction for attempting to elude should be reversed and dismissed. *State v. Fussell*, 84 Wn. App. 126, 925 P.2d 642 (1996), *State v. Hudson*, 85 Wn. App. 401,

932 P.2d 714 (1997).

In light of the State's concession the State respectfully requests this Court to dismiss the attempting to elude charge and remand the case for resentencing.

2. PURSUANT TO RECENT CASELAW THE \$200.00 FILING FEE AND \$100.00 DNA FEE SHOULD BE STRICKEN FROM THE DEFENDANT'S JUDGMENT AND SENTENCE.

The state concedes that the trial court should remove both the \$200.00 filing fee and \$100.00 DNA fee. These concessions as to the Defendant's legal financial obligations are made in light of recent legislative changes to sentencing of indigent defendant. *State v. Wallmuller*, 4 Wn. App.2d 698, 4 P.3d 282 (2018).

D. CONCLUSION

The State has conceded the errors claimed by the defendant and ask that this case be returned to the trial court for resentencing in light of the concessions.

Respectfully submitted this 7th day of March, 2019.



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Transmittal Information

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