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Court of Appeals
Division III
State of Washington
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No. 36782-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN BRADLEY RAYMOND,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

John Raymond was on his way home to bring his ailing wife a frozen slushie when a sheriff's deputy attempted to stop him for speeding. Because he did not know the deputy had signaled him to stop, and because the road was dark and he was nearly home, Mr. Raymond drove the final 0.3 miles to his house, stopping in his driveway 13 to 14 seconds after the attempted traffic stop. Believing Mr. Raymond had attempted to elude him, the deputy pointed his gun at Mr. Raymond, pushed him up against the patrol car causing a cut to his eye, and arrested him.

At trial, Mr. Raymond requested an instruction on the definition of "immediately," which the court refused to give. The court reasoned the definition was unnecessary because it did not comport with Mr. Raymond's theory of the case, even though there was evidence Mr. Raymond pulled over as soon as he could. Because the evidence was insufficient to find Mr. Raymond attempted to elude, and because the court erred by refusing to instruct the jury on the definition of "immediately," this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. In violation of the Fourteenth Amendment right to due process, the State presented insufficient evidence of attempting to elude.

2. The trial court erred in denying Mr. Raymond's request to instruct the jury on the definition of "immediately."

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment requires the government to establish all essential elements of the crime charged beyond a reasonable doubt. To prove attempting to elude, the government must establish the defendant drove his vehicle in a reckless manner while attempting to elude, but speeding alone is insufficient to prove recklessness. The government must also prove the defendant failed to stop his car immediately after being signaled by a police officer. Must this Court dismiss the charge where the government offered no evidence of driving in a reckless manner other than speeding, and failed to prove Mr. Raymond did not stop his car immediately?

2. The Sixth Amendment guarantees a person the right to present any and all available defenses. Together with the due process right to jury instructions which accurately state the law, this requires

the trial court to instruct the jury in a manner which allows the defendant to present his defenses so long as the instruction is factually supported and accurately states the law. Here, Mr. Raymond requested the court instruct the jury on the definition of “immediately,” which the court rejected, claiming it did not comport with Mr. Raymond’s theory of the case. Where the court refused to provide an instruction which accurately stated the law regarding the meaning of “immediately,” and where that instruction was necessary for Mr. Raymond’s defense that he could not have pulled over any sooner than he did, did the court deny him his rights to present a defense and to a fair trial?

D. STATEMENT OF THE CASE

Yakima County Sheriff’s Deputy Justin Paganelli was driving southbound on North Wenas Road when he saw John Raymond approaching in the opposite lane. RP 147, 151. Deputy Paganelli’s radar display indicated Mr. Raymond was driving approximately 78 miles per hour (MPH) in a 40 MPH zone. RP 151. The deputy stopped his car, waited for Mr. Raymond to pass him, and turned his vehicle around to perform a traffic stop. *Id.* This stretch of North Wenas formed an S-curve and included hills, and the road was “pitch black.” RP 150-151; Ex. 16. Michael Martian, a Yakima County Geographic

Information Services manager, said there is vegetation along parts of the northbound lane of North Wenas Road. RP 140; Ex. 16.

Deputy Paganelli stated he activated his emergency lights and siren as soon as he turned around to stop Mr. Raymond. RP 156. However, because of the curves, the deputy lost sight of Mr. Raymond by the second corner. RP 158. After driving through the corner himself, Deputy Paganelli saw Mr. Raymond had “rapidly slowed down and pulled into a driveway” at his own home. RP 158-59. The deputy claimed Mr. Raymond “nearly” lost control into a fence turning into his driveway, which both Mr. Raymond and his son, Corey Raymond,¹ denied. RP 187, 200-201, 231, 243.

Mr. Raymond came to a stop in front of the house and turned off his car. RP 159. The deputy pulled in behind Mr. Raymond, pointed his gun at him, and arrested him. RP 161. There is no evidence Mr. Raymond attempted to flee on foot. During the arrest, Deputy Paganelli injured Mr. Raymond, causing a cut above his right eye either “when he was taken out of the vehicle or when [the deputy] placed him up against the side” of the patrol car. RP 165.

¹ Because John and Corey Raymond share a last name, Corey will be referred to by first name.

Mr. Raymond testified he was on his way home to bring his ailing wife an apple slushie when he was arrested. RP 224. He denied ever hearing a siren, and did not see any lights until he was already parked in his driveway. RP 230. Corey also saw the lights as the deputy pulled in, but confirmed the siren was not activated. RP 199, 200. Corey also said there were large shrubs and trees lining the driveway. RP 203; Ex. 14. Mr. Raymond admitted he had been speeding, and that he was initially relieved when he passed Deputy Paganelli and did not see the deputy activate his lights. RP 229, 242. When he did not see any emergency lights behind him, he continued home. RP 229. Mr. Raymond slowed his car down as he approached the S-curve and also slowed down to approximately 10 to 15 MPH before turning into his driveway. RP 231, 238.

In total, Mr. Raymond drove 0.3 miles from where he passed Deputy Paganelli to where he stopped his car in his driveway. RP 139-141. The deputy followed Mr. Raymond for approximately 26 seconds, and defense estimated Mr. Raymond arrived in his driveway in about 13 seconds based on how quickly he had been driving. RP 142, 267; Ex. 16.

At trial, counsel requested an instruction defining the word “immediately” to assist jurors with the to-convict instruction. RP 246. Defense proposed the definition provided in *State v. Sherman*, 98 Wn.2d 53, 57, 653 P.2d 612 (1982), explaining that “a definition of immediately explains that it doesn’t mean instantaneous. There’s a little more grace there.” RP 246. The proposed instruction read: “Immediately means stopping as soon as reasonably possible once signaled by a police officer to halt.” CP 35.

The trial court refused to provide the definitional instruction. RP 247. The court reasoned defense’s theory of the case did not require such an instruction, stating, “[T]he issue of whether the pulling over was immediately. . . is really irrelevant. . . It’s not a situation where somebody is actually looking for a good place to pull over out of traffic. . .” RP 246-47. The jury convicted Mr. Raymond as charged.

E. ARGUMENT

1. The State presented insufficient evidence of attempting to elude a police vehicle.

The State is required to prove all elements of the charged offense beyond a reasonable doubt, and the failure to do so requires dismissal of the charge. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. Evidence is

insufficient to support a verdict where “mere speculation, rather than reasonable inference, supports the government’s case.” *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). The remedy is reversal and remand for judgment of dismissal with prejudice. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016), *review denied*, 187 Wn.2d 1 (2017).

a. The State presented insufficient evidence Mr. Raymond drove in a reckless manner.

An attempting to elude conviction requires proof the defendant drove his vehicle “in a reckless manner while attempting to elude a pursuing police vehicle.” RCW 46.61.024(1). For the purposes of this statute, the “reckless manner” standard is the same as that for vehicular homicide or vehicular assault. *State v. Ridgley*, 141 Wn. App. 771, 781, 174 P.3d 105 (2007). Proof that the defendant drove in a reckless manner requires proof that he drove in “a rash or heedless manner, with indifference to the consequences.” *State v. Naillieux*, 158 Wn. App. 630, 644, 241 P.3d 1280 (2010).

Speeding in itself does not necessarily establish driving in “a rash or heedless manner, indifferent to consequences.” *State v. Randhawa*, 133 Wn.2d 67, 78, 941 P.2d 661 (1997). The Ninth Circuit has specifically rejected a “speeding alone” approach in the context of

Washington's vehicular homicide statute in *Schwendeman v. Wallenstein*, 971 F.2d 313 (9th Cir. 1992). There, the Ninth Circuit held that a permissible inference instruction, informing the jury "that it could ignore all the other evidence, consider only the evidence of . . . speed, and if it found Schwendeman was exceeding the speed limit, that it was enough to convict him – not of speeding, but of reckless driving." *Id.* at 316.

In virtually every attempting to elude case, speeding is only part of the evidence needed to establish the defendant drove in a reckless manner. *See, e.g., State v. Perez*, 166 Wn. App. 55, 269 P.3d 372 (2012) (defendant doubled speed, frightened pedestrian and dog, ran through stop sign, and abandoned car); *State v. Treat*, 109 Wn. App. 419, 35 P.3d 1192 (2001) (defendant sped, accelerated at a deputy, then attempted to drive away again after deputies shot out two of his tires); *State v. Refuerzo*, 102 Wn. App. 341, 7 P.3d 847 (2000) (defendant weaved through traffic during rush hour, ran several stop signs and lights, cut across multiple lanes of traffic, travelled through crosswalks with pedestrians present, and collided with another vehicle).

Here, the only criticism of Mr. Raymond's driving was his excessive speed. Deputy Paganelli noted no other alleged traffic

offenses, and there was no evidence Mr. Raymond violated any traffic laws other than the speed limit. At most, the deputy thought Mr. Raymond turned too quickly into his driveway and almost hit a fence, but both John and Corey Raymond denied this. No collision or property damage occurred. Additionally, Mr. Raymond testified he slowed down as he approached the curves on North Wenas Road and reduced his speed to approximately 10 to 15 MPH before turning into his driveway to avoid hitting the fence and damaging a nearby railroad. RP 238, 243.

To establish Mr. Raymond attempted to elude a police vehicle, the State was obligated to prove he drove his car in a reckless manner, meaning in a rash or heedless manner, indifferent to consequences. Here, evidence Mr. Raymond was speeding, without more, is insufficient to establish he was driving in a reckless manner. Moreover, evidence that Mr. Raymond slowed down to navigate curves in the road and to turn safely into his driveway without damaging a nearby fence and railroad demonstrates he was not indifferent to consequences.

b. The State presented insufficient evidence Mr. Raymond failed to immediately bring his car to a stop after the deputy signaled him.

Moreover, the State was required prove beyond a reasonable doubt Mr. Raymond failed to immediately bring his car to a stop after being signaled by Deputy Paganelli. RCW 46.61.024(1). In the context of attempting to elude, “immediately” means “as soon as reasonably possible once signaled by a police officer to halt.” *State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982).

Here, Mr. Raymond was traveling at 78 MPH and reached his driveway in approximately 13 seconds. He traveled only 0.3 miles from where he first saw Deputy Paganelli. Other than establishing there were places on the side of the road where a person could potentially pull over, there was no reasonable evidence it was safe for Mr. Raymond to pull over until he got to his driveway. The State offered no evidence Mr. Raymond could physically bring his car to a stop any sooner than he did. There was no evidence of the car’s braking abilities, Mr. Raymond’s reaction times, or the estimated time it would take a car traveling 78 MPH to come to a complete stop.

Absent this evidence, it is impossible to determine whether Mr. Raymond willfully failed to bring his car to stop as soon as reasonably

possible after being signaled by the deputy, or whether stopping in his driveway was indeed the closest place he could safely come to a stop.

Because the State's evidence was insufficient to prove beyond a reasonable doubt that Mr. Raymond drove in a reckless manner, and it was insufficient to show he willfully failed to stop his car immediately, this Court should reverse.

2. The court denied Mr. Raymond his rights to a fair trial and to present a defense when it refused to instruct the jury on the definition of “immediately” as it pertains to the offense of attempting to elude a police vehicle.

a. The right to a fair trial and the right to present a defense require the trial court to fully instruct the jury on the applicable law.

“Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact.” U.S. Const. amend. XIV; *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010) (citing *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)). A trial court may only deny a requested jury instruction that presents a theory of the defendant's case only where the theory is *completely* unsupported by evidence. *Koch*, 157 Wn. App. at 33 (citing *Barnes*, 153 Wn.2d at 382). “As with all

proposed jury instructions,” the evidence is viewed “in the light most favorable to the proponent of the instruction.” *State v. Hanson*, 59 Wn. App. 651, 656-57, 800 P.2d 1124 (1990) (citing *Seattle v. Cadigan*, 55 Wn. App. 30, 37, 776 P.2d 727 (1989)). Thus, so long as there is some evidence to support a defense theory, and the instruction accurately states the law, it is reversible error to refuse to give the defendant’s proposed instruction. *Id.* at 659.

Additionally, when requested, “[t]rial courts must define technical words and expressions used in jury instructions.” *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). A term is “technical” when its common usage differs from its meaning under the circumstances. *Id.* at 611. The failure to instruct on the definition of a technical term is reviewed for harmless error. *State v. Flora*, 160 Wn. App. 549, 554, 249 P.3d 188 (2011). An error is harmless only if it is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

b. The trial court erred when it refused to instruct the jury on the definition of “immediately” as it pertains to the offense of attempting to elude, thereby denying him the right to present a defense and the right to a fair trial.

Mr. Raymond asked the court to instruct the jury on the definition of immediately announced in *Sherman*, 98 Wn.2d at 57. The proffered instruction read: “Immediately means stopping as soon as reasonably possible once signaled by a police officer to halt.” CP 35 (citing *Sherman*, 98 Wn.2d at 57). The court refused, stating the issue of immediately pulling over was “irrelevant,” and, “It’s not a situation where somebody is actually looking for a good place to pull over out of traffic or something like that.” RP 246-47. This is incorrect, and the court’s failure to provide this instruction impaired the jury’s understanding of a critical legal term.

The proposed instruction accurately reflected the law in Washington that “immediately” means “stopping as soon as reasonably possible once signaled by a police officer to halt.” *Sherman*, 98 Wn.2d at 57. The court made no findings that this definition of “immediately” was inaccurate, but rather it found it did not comport with Mr. Raymond’s theory of the case – that is, that he did not see or hear the deputy signal him to stop. RP 247. The court’s assessment of Mr.

Raymond's available defenses was improper, and by refusing to instruct on the definition of "immediately," the court effectively denied Mr. Raymond the right to present an additional defense: that he did in fact stop "as soon as reasonably possible."

Mr. Raymond's primary defense was that he did not see or hear Deputy Paganelli signal him to stop his car. However, it is not uncommon for defense counsel to proffer more than one defense theory, even where those theories conflict. *See, e.g., State v. Roberts*, 75872-1-I, 2018 WL 2021875, at 4 (Apr. 30, 2018) (unpublished)² (in assault trial, defense proffered both general denial and self-defense defenses). Indeed, defense counsel must investigate all reasonable lines of defense," and the failure to consider alternative defenses constitutes ineffective assistance. *In re Davis*, 152 Wn.2d 647, 721-22, 101 P.3d 1 (2004).

Here, the evidence established the road was dark and unlit, and that there were trees, shrubs, and other vegetation along the northbound lane of North Wenas Road, where Mr. Raymond was driving. The evidence also showed Mr. Raymond only traveled an additional 0.3 miles over approximately 13 seconds before stopping in his driveway.

² Cited pursuant to GR 14.1.

It is unlikely a person driving 78 MPH could safely stop in less than 13 seconds or 0.3 miles. This was sufficient for defense to argue alternatively that Mr. Raymond stopped his car as soon as reasonably possible after the deputy initiated the traffic stop. The requested instruction was necessary to ensure the jury fully understood what “immediately” stopping your car entails in this legal context.

The trial court’s refusal to instruct the jury on the definition of “immediately” was also erroneous because the term carries a technical meaning which differs from its common usage. Webster’s Dictionary defines immediately as “without interval of time: straightway.” Webster’s Third New International Dictionary 1129 (2002). In contrast, the definition of immediately as used in the context of attempting to elude means “stopping as soon as possible once signaled by a police officer to halt.” *Sherman*, 98 Wn.2d at 57

In finding the issue of “pulling over immediately or not” irrelevant to Mr. Raymond’s defense and refusing to provide an accurate legal definition of “immediately,” the trial court prevented Mr. Raymond from arguing the State failed to proving this essential element, that he stopped his car as soon as he could. As a result, Mr. Raymond was not allowed to argue all theories of his case that were

supported by sufficient evidence, the jury was not fully instructed on this alternative theory or the applicable law, and the jury was denied the discretion to decide questions of fact. *See Koch*, 157 Wn. App. at 33.

c. The instructional error is not harmless; this Court must reverse Mr. Raymond's conviction.

A constitutional error is presumptively prejudicial and requires reversal unless it is harmless beyond a reasonable doubt. *Hanson*, 59 Wn. App. at 659. Had the proposed definitional instruction been given, Mr. Raymond could have argued, and jurors could have reasonably agreed, he stopped his car soon as he could reasonably do so as the law provides. The court's failure to instruct the jury on the meaning of "immediately" denied Mr. Raymond the right to present this alternative defense and denied him a fair trial. Moreover, the failure to instruct left the jury solely with the common definition of "immediately," rather than the technical meaning, which permits reasonable time to stop. The State cannot prove beyond a reasonable doubt the error was harmless.

F. CONCLUSION

For the reasons stated above, this Court should reverse Mr. Raymond's conviction and dismiss the charge of attempting to elude.

DATED this 30th day of October 2019.

Respectfully submitted,

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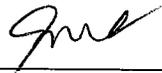
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