

63064-4

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NO. 63064-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

TREVOR L. WEST,

Appellant.

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS, DIV. #1
STATE OF WASHINGTON
2010 JAN 21 AM 10:47

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I. ISSUES

1. A witness made an unresponsive remark that he thought the defendant's statement was comical when testifying about the defendant's statements after his arrest.

a. When the defendant did not object on the basis that it was an improper opinion may he raise this issue for the first time on appeal?

b. If so, was the remark harmless in light of all of the untainted evidence?

2. Is the Attempting to Elude A Pursuing Police Vehicle statute unconstitutional?

II. STATEMENT OF THE CASE

On August 24, 2007 Trooper Leary of the Washington State Patrol was on duty travelling southbound on Interstate 5 in lane 1 near the exit to Interstate 405 about 9 p.m. Trooper Leary was driving a black Chevrolet Impala that was equipped with red and blue lights in the grille and on the windshield under the visors, strobe lights in the rear window, and wig wag lights in the rear tail lights. It was also equipped with a siren. The patrol car did not have an emblem on the side of the vehicle, nor did it have a light

bar attached to the roof. Trooper Leary was wearing his uniform. 1-26-09 RP 25, 29-31, 36, 42.

As Trooper Leary approached the exit to I-405 he noticed a grey Nissan Stanza which had been driving in lane 2, cut across lane 1 in front of the trooper's car, cross the gore point and exit to I-405. As the driver of the Stanza passed in front of the trooper's car the driver flipped a cigarette out of the driver's window. The cigarette bounced off the trooper's hood. Trooper Leary followed the Stanza. He activated his lights in the corner of the exit ramp to signal the driver of the Stanza to stop. 1-26-09 RP 32-35.

The driver of the Stanza slowed down and pulled over to the shoulder. The Stanza driver drove on the shoulder for a bit before going back on to the ramp leading up to I-405. Trooper Leary then activated his siren when the driver of the Stanza refused to pull over in response to the trooper's lights. Trooper Leary saw the driver of the Stanza turn around and look back at him as he was signaling the driver to pull over. 1-26-09 RP 35-37.

Trooper Leary followed the Stanza for approximately 3 miles on I-405. Traffic was light to moderate. The Stanza drove on the shoulder passing traffic on the right and then went back into the lane of travel. Traffic in the HOV lanes moved to the right for the

Trooper to pass on the left. Trooper Leary moved to the left lane to avoid a collision with other cars on the road. The Stanza changed lanes between lane 2 and 1 cutting off other cars while the trooper drove behind it. The Stanza nearly collided with some of the other cars on the road. The trooper and Stanza drove up to 80 m.p.h. at one point. 1-26-09 RP 38-41.

Before reaching the exit to SR 527 Trooper Leary notified communications and other patrol officers nearby that he intended to discontinue the pursuit if the driver of the Stanza exited the freeway there. The driver did exit at SR 527. Two other troopers were ahead at the top of the exit ramp. One of the troopers blocked the top of the ramp with his patrol car. The driver of the Stanza pulled over and stopped, straddling the fog line. The driver put his hands up and opened the door. Trooper Leary ordered the driver to walk backwards toward him. When the driver did so the driver was placed in custody and identified as the defendant, Trevor West 1-26-09 RP 42-43.

Trooper Leary asked the defendant if he had seen the lights. The defendant said "Man, I thought that you were my friend, Corey, that was trying to get me." The defendant said Corey drove a car just like the trooper's. 1-26-09 RP 44-45.

The defendant was charged with one count of Attempting to Elude a Pursuing Police Vehicle. 1 CP 111-112. He was found guilty of the charge by jury verdict. 1 CP 48.

III. ARGUMENT

A. THE WITNESSES' UNSOLICITED STATEMENT IS NOT A MANIFEST CONSTITUTIONAL ERROR WHICH SHOULD BE REVIEWED FOR THE FIRST TIME ON APPEAL. ALTERNATIVELY ANY ERROR WAS HARMLESS.

On direct examination the prosecutor asked Trooper Leary about the defendant's statements after arrest:

Q: Do you remember what the extent of that conversation was?

A: There was not a whole lot of conversation. He made a reference to he thought it was a buddy of his following him which I thought was kind of comical, myself. There's not many people that drive around –

1-26-09 RP 43.

The defense attorney interjected an objection before the trooper finished his sentence. The basis for counsel's objection was "calls for speculation." The trial court sustained the objection. 1-26-09 RP 43-44. The prosecutor did not pursue why the trooper thought the defendant's statement was comical, and he did not reference that statement in his closing argument.

The defendant now alleges that the trooper's unsolicited statement was an impermissible opinion of the defendant's

credibility on the issue of whether the defendant knew that he was being signaled to stop by a pursuing police officer. The defendant has not preserved this issue for review.

A party who objects to evidence on one ground may not raise a second ground for that objection on review. State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007), cert. denied, _____ U.S. ____, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008). The purpose of the objection is to give the trial court the opportunity to prevent or cure an error. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

A Court may review an issue for the first time on appeal if it constitutes a manifest constitutional error. Id. at 926. The analysis has four steps:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

A witness may not offer an opinion about the defendant's credibility. Kirkman, 159 Wn.2d at 927. An improper opinion may deprive the defendant of his constitutional right to an independent determination of the facts by the jury. Id. Thus the defendant does raise a constitutional issue.

In Kirkman the Court required an explicit or almost explicit statement regarding the witnesses' credibility in order to find the alleged constitutional error met the "manifest error" standard. Id. at 936-938. Thus, where a doctor in a sexual assault trial testified that the child victim gave a "clear history" with "lots of detail" he was not clearly testifying that he believed the child's statement or that the defendant was guilty. Kirkman, 159 Wn.2d at 930.

In another sexual assault case the witness did not give a direct opinion that the child victim was truthful when reporting the defendant had raped her simply because the witness testified she told the child "I believe you." State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), review denied, 125 Wn.2d 1018, 881 P.2d 254 (1994). In contrast the same witness did explicitly opine the defendant was guilty when she testified that "I felt that this child had been sexually molested by [the defendant] at that point." Id. at 813.

The Court held testimony from an officer regarding his interview with the defendant did constitute an improper opinion that defendant was guilty in State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004), review denied, 154 Wn.2d 1009, 114 P.3d 1198 (2005). In Barr the officer testified that he had been trained in the Reid Interview technique which he used when interviewing the defendant. The officer said he observed the defendant do various things which the officer had been taught were indicative of deception. The officer concluded that the defendant's claims of innocence did not seem genuine to him. Although the defendant did not object to this testimony at trial the Court held the error was manifest, justifying review. The Court reasoned that the credibility of the victim and defendant were a crucial part of the case. The officer not only gave his opinion but bolstered it with statements relating to his Reid training. Id. at 381.

The officer's statements here are similar the indirect statements in Kirkman and Jones and nothing like the direct opinions of guilt in Jones and Barr. The trooper did not directly testify that he did not believe the defendant did not know he was being followed by a police officer who was signaling him to pull over. At best he said the defendant's explanation for not pulling

over seemed humorous. That still left open the possibility that the defendant did not recognize that he had been signaled to pull over, just not for that reason. Unlike Barr the crucial issues for the jury to decide did not rest on an evaluation of competing versions of events.

There was uncontroverted evidence which supported the conclusion that the defendant did willfully fail to stop when signaled to do so by the trooper. The defendant looked behind him at the trooper and did slow and pull to the shoulder when first signaled to stop. Other vehicles on the road were pulling to the right as the trooper came up on them; a maneuver which is common when an emergency vehicle is approaching. The siren was activated and could be heard inside a vehicle, even with the radio on. 1-26-09 RP 36-37, 39-40. There was also uncontroverted evidence that when the patrol lights are activated that it is hard for a driver to see what kind of car is pulling him over. 1-26-09 RP 37. In these circumstances the officer's passing statement that the defendant's claim that he thought he was being followed by his friend was comical did not have any "practical and identifiable consequence" at trial.

If the Court were to consider the merits of the defendant's claim at best the officer's statement constitutes harmless error. Constitutional error is harmless if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). The same evidence which prevents the officer's comment from being a manifest constitutional error supports the conclusion that any error was harmless. The defendant's initial response to the officer's light signal to pull over proves he understood he was being signaled to stop and he willfully refused to do so. The defendant's claim that he mistook the officer's car for his friend's car is not possible given the uncontroverted evidence that the police lights prohibit a person from discerning the type of vehicle that is following. Given the untainted evidence, the defendant would necessarily have been found guilty even without the officer's unsolicited comment.

B. THE AFFIRMATIVE DEFENSE DOES NOT RELIEVE THE STATE OF ITS BURDEN TO PROVE EVERY ELEMENT OF THE OFFENSE.

The Legislature amended RCW 46.61.024, Attempting to Elude a Pursuing Police Vehicle in 2003. The amendment added an affirmative defense to the charge that a reasonable person

would not believe that the signal to stop was given by a police officer. See Laws of Washington 2003, Ch. 101, § 1. The defendant alleges that the affirmative defense renders the statute unconstitutional because it relieves the State of its burden to prove every element of the crime.

The State bears the burden to prove every element of the crime charged. State v. Fisher, 165 Wn.2d 727, 753, 202 P.3d 937 (2009). The Legislature defines the elements of the offense. State v. Bradshaw, 152 Wn.2d 528, 535-36, 98 P.3d 1190 (2004), cert. denied, 544 U.S. 922, 125 S.Ct. 1662, 161 L.Ed.2d 480 (2005). The Legislature may provide for an affirmative defense to the charge which the defendant must prove by a preponderance of the evidence. State v. Box, 109 Wn.2d 320, 328, 745 P.2d 23 (1987) (citing opinions which recognized where the Legislature had clearly provided that the defendant must prove certain defenses by a preponderance of the evidence.) “The allocation of the burden of proof raises a due process question only if the absence of an essential element of the crime is an affirmative defense. State v. Peyton, 29 Wn. App. 701, 719, 630 P.2d 1362, review denied, 96 Wn.2d 1024 (1981). If a statute indicates the intent to include the absence of a defense as an element of the offense or if the defense

negates one or more element of the offense then the State has a constitutional burden to prove the absence of a defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983), State v. Lively, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996).¹

The State must prove the lack of self defense in murder, assault, and manslaughter cases because self defense is defined as a lawful act which negates the mental elements of those charges. State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989). In contrast there is no constitutional requirement that the State prove the defendant was legally sane at the time he committed the offense. An offense is not lawful simply because the defendant was insane at the time. In addition, insanity does not preclude the ability to form a particular mental state. Box, 109 Wn.2d at 329-330.

The defendant argues the affirmative defense relieves the State of its burden to prove that he knew that a police officer was

¹ The Supreme Court expressed doubt about the correctness of the negates an element of the offense portion of the test in Camera, 113 Wn.2d at 639 in light of a then recent United States Supreme Court case, Martin v. Ohio, 480 U.S. 228, 230, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987). Despite the Court's position in Camera it affirmed the use of the negates tests in Lively, 130 Wn.2d at 10.

pursuing him. BOA at 16. To prove the defendant attempted to elude a pursuing police vehicle the State must in part prove that (1) the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop and (2) that while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner. WPIC 94.02, RCW 46.61.024(1). To prove a defendant attempted to elude a pursuing police vehicle the defendant must necessarily know that there is a pursuing police vehicle. State v. Stayton, 39 Wn. App. 46, 49, 691 P.2d 596 (1984), review denied, 103 Wn.2d 1026 (1985).

The officer who is pursuing the defendant need not necessarily be the officer who signals the defendant to stop. Id. at 50. Thus the two elements may relate to separate police officers. The affirmative defense relates to the officer who signals the defendant to pull over. It does not relate to the officer who is pursuing the defendant. Thus the affirmative defense does not relieve the State of the burden to prove that the defendant knew that he was being pursued by a police officer when he was “attempting to elude”.

The Court previously addressed the mental state required for the “willfully refused to stop” element Stayton. Stayton initially

stated the element implied knowledge that a signal had been given. It then stated that that one cannot willfully fail to stop unless there is the prerequisite knowledge that a statutorily appropriate signal had been given by a statutorily appropriate police officer. Id. at 49.

The Stayton decision predated the 2003 amendments to the Eluding statute. In those amendments the Legislature not only added the affirmative defense, but it eliminated the requirement that the vehicle used by the officer giving the signal to stop be appropriately marked to show that it is an official police vehicle. Laws of Washington 2003, Ch. 101, §1. The amendments indicate a Legislative intent to eliminate the mental state which the Stayton Court interpreted the statute required in order to prove the defendant willfully failed to stop.

The defendant states the statute was amended in response to State v. Argueta, 107 Wn. App. 532, 27 P.3d 242 (2001). Argueta interpreted the former requirement that the signaling officer's vehicle be appropriately marked to mean that the vehicle bore an insignia that identified the vehicle as an official police vehicle.

When amending a statute the Legislature is presumed to know how the courts have construed and applied the statute. State v. Roggenkamp, 153 Wn.2d 614, 629, 106 P.3d 196 (2005).

The legislature must be presumed to know both the language employed in the former acts and the judicial construction placed upon them; and if in a subsequent statute on the same subject it uses different language in the same connection, the courts must presume that a change of the law was intended, and after a consideration of the spirit and letter of the statute will give effect to its terms according to their proper significance.

Alexander v. Highfill, 18 Wn.2d 733, 742, 140 P.2d 277, 281, (1943).

When interpreting a statute the Court's primary duty is to ascertain and give effect to the intent and purpose of the Legislature. State v. Hennings, 129 Wn.2d 512, 522, 919 P.2d 580 (1996). When there has been a change in a statute the Court should compare the original statute with the amendment to determine what the amendment was intended to remedy. State v. Dubois, 58 Wn. App. 299, 303, 793 P.2d 439 (1990).

Eliminating the requirement that the signaling officer's vehicle be marked directly impacts the knowledge requirement that the Stayton Court found was implicit in the former version of the statute. Argueta stated the purpose of the appropriate marking requirement was to assure a driver being pursued that the pursuing

vehicle is a police vehicle and not someone impersonating an officer. Id. at 537. That assurance relates to the driver's knowledge. In removing the appropriate marking requirement the Legislature has indicated its intention that the driver's knowledge that he has been signaled to stop by a police officer is no longer necessary in order to prove a willful failure to stop. As such the driver's knowledge regarding the signaling officer is no longer part of an essential element of the offense. It follows then that the affirmative defense does not negate an element of the offense. The statute does not deprive the defendant of his due process right to have the State prove every element of the offense.

Finally, even if the affirmative defense negated an element of the offense the remedy is place the burden of proof on the prosecution to prove the absence of the defense. It is not to find the statute unconstitutional. State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984).

IV. CONCLUSION

For the forgoing reasons the State requests that the Court

affirm the conviction and find RCW 46.61.024 is constitutional.

Respectfully submitted on January 20, 2010.

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