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No. 64149-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES FLORA,

Appellant.

2018 AUG 13 PM 4:36
FILED
CLERK OF COURT
JANIS L. WILSON

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. MR. FLORA DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY DID NOT SUBMIT A JURY INSTRUCTION ON A RELEVANT STATUTORY DEFENSE

RCW 46.61.024(2) provides an affirmative defense to the crime of attempting to elude a pursuing police vehicle when (1) a reasonable person in the defendant's position would not believe the signal to stop was given by a police officer and (2) the driving after the signal to stop was reasonable under the circumstances. James Flora argues he did not receive effective assistance of counsel because his attorney did not offer a jury instruction on this statutory defense despite ample evidence that a reasonable person would not have known Tribal Traffic Officer Martin Radley was a police officer or in a police vehicle. Brief of Appellant at 6-18. The State responds the court would not instructed the jury on the defense because Mr. Flora did not testify and could not establish the second prong of the defense, and his lawyer therefore made a tactical decision not to offer the instruction. Respondent's Brief at 8-13.

To warrant the statutory reasonable person instruction, Mr. Flora simply had to produce some evidence to support it; the trial court would have examined the evidence in the light most favorable

to the defendant. State v. Ginn, 128 Wn.App. 872, 879, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006). While the State is correct that Mr. Flora did not testify in his own defense, this does not preclude the court from instructing the jury on the affirmative defense. As the jury here was instructed, "Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it." CP 101 (Instruction 1).

Officer Radley testified that he turned on his traffic patrol car's lights and siren after a white Camaro quickly entered State Highway 20. RP 30-31. He followed the car for less than a mile and estimated it was going about 70 miles per hour in a 55-mile-per hour zone. RP 31-32. At the intersection of State Route 20 and Hoffman Road, the lights were green, but the left-turn light was red. The Chevrolet turned left against the light, but did so without incident. RP 34-35. The jury thus could have concluded this driving, while not exemplary, was not unreasonable.

Looking at the evidence of the Camaro's actions after the officer's signal to stop in the light most favorable to the defense, the court would have given the jury an instruction on the statutory defense, RCW 46.61.024(1). As explained in Mr. Flora's opening brief, there was also ample evidence that a reasonable person

driving the car would not have known Officer Radley was a police officer, and the State does not argue otherwise. This Court should therefore reject the State's argument that Mr. Flora's attorney's failure to propose such an instruction was tactical.

Mr. Flora did not receive effective assistance of counsel, and his conviction must be reversed and remanded for a new trial. State v. Thomas, 109 Wn.2d 222, 229, 232, 743 P.2d 816 (1987).

2. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF THE TERM "WILLFULLY"

Mr. Flora's attorney submitted a proposed jury instruction that would have told the jury the eluding statute requires the defendant know he was given a "statutorily appropriate" signal to stop by a "statutorily appropriate" police officer. CP 97. When the trial court declined to give the proposed instruction, defense counsel orally asked the court to instruct the jury on the definition of the term "willfully" found at WPIC 10.05. RP 90-93. On appeal Mr. Flora challenges the court's failure to provide the jury with the definition of "willfully," WPIC 10.05. Brief of Appellant at 18-27. He has not assigned error to the court's decision not to give the other proposed instruction; it is not at issue.

Washington has long recognized that technical words or expressions contained in the elements of a charged crime must be defined for the jury. State v. Scott, 110 Wn.2d 682, 689-90, 757 P.2d 492 (1988). While willfulness is a commonly understood word, its legal definition differs from its dictionary definition, and specific statutes may provide a separate definition. RCW 9A.08.010(4); Webster's Third International Dictionary at 2617 (1993). The Washington Pattern Jury Instructions therefore provide an instruction defining willfully and caution that the instruction should not be given if a particular statute provides a different definition of the term. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal WPIC 10.05 at 214-15 (2008)(WPIC).

One of the elements of attempting to elude a pursuing police vehicle is that the defendant "willfully" failed or refused to immediately bring his vehicle to stop after being signaled to stop. RCW 46.61.024(1); CP 106-07 (Instructions 5-6). The eluding statute, RCW 46.61.024, does not provide a separate definition of the term "willfully" and neither does the motor vehicle code. RCW 46.61.024: RCW Ch. 46.04. Mr. Flora was therefore entitled to have the jury instructed on the legal definition of the term "willfully" found at WPIC 10.05.

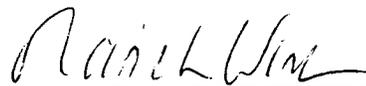
Because the jury would not know that the term “willfully” meant with knowledge, the court erred by failing to give the definition of this technical term. State v. Allen, 101 Wn.2d 355, 362, 678 P.2d 798 (1984) (reversible error to fail to provide definition of “intent” when it is an element of the offense and the instruction is requested by defense). Mr. Flora need not show prejudice. Id. This Court must therefore reverse Mr. Flora’s conviction for attempting to elude a pursuing police vehicle and remand for a new trial.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Mr. Flora’s conviction should be reversed and remanded for a new trial.

DATED this 13th day of August 2010.

Respectfully submitted,



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