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No. 71146-6

King County Superior Court No. 13-1-01031-0 KNT

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

CAROLYN RICHARDSON,
Defendant-Appellant.

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

The Honorable Patrick Oishi, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The jury was instructed on an uncharged alternative means of committing the crime of hit and run.

2. There was insufficient evidence to convict Richardson of hit and run because no reasonable person would have known that they were “involved in an accident.”

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Where RCW 46.52.020 provides for two alternative means of committing the crime of felony hit and run, did the trial court err when it instructed the jury on the uncharged alternative?

2. Where Richardson did not see the child on the bike, concluded that she had driven over road debris and looked out her rearview mirror and saw nothing, was there sufficient evidence to conclude that she knew she had been “involved in an accident?”

III.
STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Carolyn Richardson was charged with the crime of felony hit and run alleged to have occurred on November 1, 2012. CP 1-2. The case was

tried to a jury. Richardson was convicted as charged and received a standard range sentence. CP 29-31. This timely appeal followed. CP 32.

B. SUBSTANTIVE FACTS

Tyanna Apodaca testified that she was 12 years old. RP 316. On November 1, 2012, she was riding a relatively new bike to school. RP 317. It was a 15-20 minute ride from her home to the school. RP 316. She had ridden the same route 10 to 20 times before. RP 318. She identified the spot where the accident occurred and stated that she knew that cars came out of a driveway at that spot. RP 320.

On November 1, she left home at 7:20 am. RP 321. It was raining and “between light and dark.” RP 322-23. She said she was wearing a bright red hoody and light blue jeans. RP 323. She was not wearing a helmet or reflective gear. RP 349.

As she approached the point where a side street entered Central Avenue, a truck was blocking her path on the sidewalk. RP 326-27. Tyanna said that she stopped for the truck. RP 326. After the truck cleared the sidewalk, Tyanna said that she “looked both ways” and resumed riding. RP 330. She said she made it halfway through the intersection and was struck by a car. RP 330. Tyanna said that she had not seen the car as she started out. RP 331. She said the car stopped before proceeding onto Central. RP 331. She saw the driver but the driver was not looking in her

direction. RP 332. She said that her tire was pulled under the car and she was run over twice. RP 333. Her hand was also hurt. RP 335.

A couple in another car stopped. The woman called 911. RP 339. Her companion followed Richardson's vehicle and recorded the license plate number. RP 278.

The Kent Police contacted Richardson shortly thereafter and she immediately came to the Kent Police Station. RP 15. Richardson was interviewed by the police and was very cooperative. RP 18. Richardson said that she felt a bump when she was driving but believed that she ran over a hubcap or a muffler. RP 163. She was very distraught when she learned that Tyanna had been injured. RP 32, 163.

In her taped statement, Richardson said that it was dark and rainy. State's Exhibit 22, RP 181, 196. She thought she hit a hubcap but she looked in the rearview mirror and did not see anything, Exhibit 22, so she proceeded to work. *Id.*, RP 216-17.

Richardson testified that as she approached the accident location, there was a large truck in front of her. RP 411. And she was listening to the radio. RP 413. It was dark and pouring rain. *Id.* As she proceeded across the sidewalk from the driveway, she looked to the left and the right. RP 414. She felt a bump but thought it was road debris. RP 415. She looked in her rearview mirror and saw nothing, so she did not stop. *Id.* It

was only after the police called that she realized she had been in an accident. RP 418-19. She was very upset. RP 421.

IV. ARGUMENT

**A. THIS COURT MUST REVERSE RICHARDSON'S
CONVICTION BECAUSE THE JURY WAS INSTRUCTED ON
AN UNCHARGED ALTERNATIVE MEANS OF
COMMITTING THE CRIME**

The information stated:

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse CAROLYN RICHARDSON of the crime of Hit and Run – Felony, committed as follows:

That the defendant CAROLYN RICHARDSON in King County, Washington, on or about November 1, 2012, while driving a motor vehicle was knowingly involved in an accident resulting in injury of another person and failed to carry out all of the following duties: 1) immediately stop her vehicle at the scene of the accident or as close thereto as possible; 2) immediately return to and remain at the scene of the until all duties are fulfilled; 3) give her name address, insurance company, insurance policy number, vehicle license number and exhibit her driver's license to any person struck or injured or the driver of or any occupant of or any person attending any vehicle collided with; and 4) render to any person injured in the accident reasonable assistance, including the carrying or making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or such carrying is requested by the injured person or on his or her behalf;

Contrary to RCW 46.52.020(1), (4)(a) or (b), and against the peace and dignity of the State of Washington.

CP 1-2.

But Instruction 6 included an additional alternative means of committing the crime. *See* WPIC 97.03, Note on Use and comment. The instruction stated:

A person commits the crime of hit and run when he or she is the driver of a vehicle and is knowingly involved in an accident resulting in injury to any person and fails to carry out his or her obligation to fulfill all of the following duties:

- (1) Immediately stop the vehicle at the scene of the accident or as close thereto as possible;
- (2) Immediately return to and remain at the scene of the accident until all duties are fulfilled;
- (3) Give his or her name, address, insurance company, insurance policy number, and vehicle license number, and exhibit her driver's license, to any person struck or injured or the driver or any occupant of, or any person attending, any vehicle collided with; *or if none of the persons specified are in condition to receive the information and no police officer is present, immediately report the accident to the nearest office of the police, give her name, address, insurance company, insurance policy number, and vehicle license number, and exhibit her driver's license, after fulfilling all of other obligations insofar as possible on her part to be performed;* and
- (4) Render to any person injured in the accident reasonable assistance, including the carrying or making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person or on his or her behalf.

CP 6-7. The italicized portion of the instruction is found in RCW 46.52.020(7), an alternative duty to report. Richardson was charged only with the primary duties under RCW 46.52.020(3).

Richardson's counsel did not object to Instruction 6. But even if not raised at the trial court, a party on appeal may raise claims of "manifest error affecting a constitutional right." RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 94, 217 P.3d 756, 759 (2009). The Sixth Amendment and Article 1, section 22 require charging documents to notify an accused of the charges he must defend against. *State v. Kjorsvik*, 117 Wn.2d 93, 97-98, 812 P.2d 86 (1991).

When an information alleges an alternative means of committing a crime, it is reversible error for the jury to consider other means by which the crime could have been committed, regardless of the evidence admitted at trial. *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003); *State v. Williamson*, 84 Wn. App. 37, 42, 924 P.2d 960 (1996); *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). This is because "[o]ne cannot be tried for an uncharged offense." *Id.* Consistent with the constitutional requirement that a defendant be informed of the charges he or she faces at trial, this Court reviews instructional errors de novo to determine whether the challenged instruction states the applicable law correctly. *State v. Aguilar*, 153 Wn. App. 265, 278-79, 223 P.3d 1158 (2009), *review denied*,

168 Wn.2d 1022, 228 P.3d 18 (2010). An error of instructing the jury on an uncharged alternative means is prejudicial and reversal is required if it is possible the jury convicted the defendant under the uncharged alternative. *Bray*, 52 Wn. App. at 34.

Here, it is possible that the jury convicted Richardson under the uncharged means. She did not immediately report the accident to the police. She provided her full information only after the police contacted her. Thus, jurors could have convicted her for failing to comply with that duty rather than the duty charged. Under the cases cited above, such an error requires reversal of the conviction.

B. THIS COURT MUST REVERSE BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CONCLUDE THAT RICHARDSON KNEW THAT SHE WAS INVOLVED IN AN ACCIDENT

“A sufficiency challenge admits the truth of the State’s evidence and accepts the reasonable inferences to be made from it.” *State v. O’Neal*, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007). Evidence is sufficient if “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, *reh’g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979)).

The offense of hit and run driving includes an element of knowledge. *See State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968), *cert. denied*, 393 U.S. 1081, 89 S.Ct. 855, 21 L.Ed.2d 773 (1969). In *State v. Vela*, 100 Wn.2d 636, 673 P.2d 185 (1983), the court held that the State is required to prove that the defendant knew the accident occurred, but not that the defendant knew that the accident resulted in injuries. *Accord, City of Spokane v. Carlson*, 96 Wn. App. 279, 285-87, 979 P.2d 880 (1999). There is no definition of “accident” in the hit and run statute, but there is no requirement that a driver collide with another vehicle in order to be “involved in an accident” for purposes of RCW 46.52.020. So it appears that the driver must have some knowledge that there was an event that could result in personal injury or death, but does not need to know that the actual death or injury occurred. Thus, even if Richardson thought she had run over road debris, she still did not have the kind of “knowledge” required for a criminal conviction.

The evidence taken in a light most favorable to State does not support the conclusion that Richardson knew that she had been involved in an accident. It was dark and raining. Tyanna was not wearing reflective clothing. Richardson looked both ways and proceeded onto Central Avenue when she felt a bump. When Richardson felt the bump, she looked back and did not see anything. Under these circumstances a

reasonable person could conclude that they had not been “involved in an accident.”

**V.
CONCLUSION**

For the reasons stated above, this Court should reverse Richardson’s conviction for felony hit and run.

DATED this 15th day of April, 2014.

Respectfully submitted,


Suzanne Lee Elliott, WSBA #12634
Attorney for Carolyn Richardson

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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