71291-8

71291-8

No. 71291-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA CARGILL,

Appellant.

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

BRIEF OF APPELLANT

ELAINE L. WINTERS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Joshua Cargill committed the crime of attempting to elude a pursuing police vehicle.

2. Prosecutorial misconduct in closing argument violated Mr. Cargill's constitutional right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amend. XIV. The driver of a vehicle commits the crime of attempting to elude a pursuing police vehicle if he fails or refuses to immediately bring his vehicle to a stop after being signaled to stop by a uniformed police officer and drives in a reckless manner while attempting to elude a pursing marked police vehicle. RCW 46.61.024(1).

a. Mr. Cargill immediately pulled over when he was signaled to do so by a marked police vehicle's lights. An essential element of the crime of eluding is that the defendant "willfully fails or refuses to immediately bring his or her vehicle to a stop." RCW 46.61.024(a). Viewing the evidence in the light most favorable to the

State, must Mr. Cargill's conviction for attempting to elude a pursuing police vehicle be dismissed in the absence of proof that he willfully failed or refused to stop?

b. Mr. Cargill drove away after he stopped for officer, but no police vehicle pursued him. An essential element of the crime of eluding is that the defendant drive his vehicle "in a reckless manner while attempting to elude a pursuing police vehicle." RCW 46.61.024(1). Viewing the evidence in the light most favorable to the State, must Mr. Cargill's conviction for attempting to elude a pursuing police vehicle be dismissed in the absence of proof of eluding a pursuing police vehicle?

2. The accused has the constitutional right to a fair trial, and a prosecutor's improper arguments may violate that right. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor committed misconduct in closing argument by arguing facts not in evidence and misrepresented the facts in a manner that appealed to the jurors' fears and prejudices. Must Mr. Cargill's conviction be reversed where the prosecutor's misconduct in closing argument was so flagrant and ill-intentioned that it could not have been cured by timely objections and curative instructions?

C. STATEMENT OF THE CASE

Arlington Police Officer Michael Sargent was alerted by an off-duty detective that Joshua Cargill, who had outstanding warrants for his arrest, was leaving the Walmart store on 172nd Street in a green Honda. 1RP 31-33, 36, 38-41.[1] Officer Sargent saw the Honda east-bound on 172nd Street, and he signaled the car's driver to pull over using the emergency lights on his marked SUV. 1RP 37-38, 40-41. Mr. Cargill immediately stopped the Honda on the shoulder of 51st Street. 1RP 42-43, 50-51. It was the afternoon, and traffic was congested. 1RP 40, 41-42.

Officer Sargent approached the Honda with his gun drawn. 1RP 44. He saw Mr. Cargill in the driver's seat and a woman in the passenger seat. 1RP 39, 45. The uniformed officer told Mr. Cargill that he was under arrest and ordered him to turn his car off and put his hands out the window. 1RP 38, 5-46. Mr. Cargill pointed out that there was a child in the backseat, and Officer Sargent holstered his weapon. 1RP 46. Mr. Cargill then drove away northbound on 51st.

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[1] The verbatim report of proceedings contains five volumes. The verbatim report of the trial referred to by the volume number provided by the court reporter:
1RP = November 25, 2013 (marked Vol. I)
2RP = November-26, 2013 (marked Vol. II)
The sentencing hearing on December 11, 2013, is referred to by date, and other volumes are not cited.

1RP 46. According to the officer, Mr. Cargill was driving fast and was using the southbound lane. 1RP 46-47.

Officer Sargent did not try to catch Mr. Cargill's car; his sergeant told him to "terminate" any pursuit. 1RP 48-49. Instead he followed Mr. Cargill slowly for about 20 blocks in order to observe his driving and direction of travel. 1RP 49-50. Officer Sargent opined that Mr. Cargill was driving at a "high rate of speed" and "was weaving in and out of lanes" on the two-lane road. 1RP 43, 50. The officer also stopped and checked with motorists who had pulled to the side of the road to make sure there had not been any accidents. 1RP 50. No one reported any injury or accidents. 1RP 53.

The Snohomish County Prosecuting Attorney charged Mr. Cargill with attempting to elude a pursuing police vehicle with an aggravating factor that one or more people, other than the defendant or the officer, were threatened with physical injury or harm by the defendant's actions. CP 164; RCW 46.61.024(1); RCW 9.94A.834. He was convicted as charged after a jury trial and given a sentence of 29 months and 1 day in prison consecutive to an earlier DOSA sentence. CP 20, 100-01; 12/11/13 RP 10. Mr. Cargill appeals, and the State cross-appeals. CP 1-15.

D. ARGUMENT

1. **The State did not prove beyond a reasonable doubt that Mr. Cargill committed the crime of attempting to elude a pursuing police vehicle.**

a. The State was required to prove every element of the attempting to elude a pursuing police vehicle beyond a reasonable doubt. The Due Process Clause protects the accused from conviction unless the State proves every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. On appellate review, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Mr. Cargill was convicted of attempting to elude a pursuing police vehicle, RCW 46.61.024. CP 101, 164. The statute reads:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal give by the police officer may be by hand, voice, emergency light, or siren.

> The officer giving the signal shall be in uniform and his vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1).

Three essential elements of the crime "must occur in sequence." State v. Stayton, 39 Wn. App. 46, 49, 691 P.2d 596 (1984), rev. denied, 103 Wn.2d 1026 (1985); accord Seth A. Fine & Douglas J. Ende, 13 Wash. Prac., Criminal Law With Sentencing Forms, § 2204 (2013-14 ed). First, a uniformed police officer with a vehicle equipped with lights and sirens must give a signal to a driver to bring the vehicle to a stop. Second, the driver must willfully fail to immediately stop. Finally, the driver must drive his vehicle in a reckless manner while attempting to elude a pursuing police vehicle. RCW 46.61.024(1); see Stayton, 39 Wn. App. at 49-50 (interpreting prior version of RCW 46.61.024(1)); 13 Wash. Prac., § 2204. Mr. Cargill's conviction must be reversed because he immediately stopped his car after being signaled to do so, and because he was not attempting to elude a pursuing police vehicle when he drove away.

b. The State did not prove beyond a reasonable doubt that Mr. Cargill refused or failed to immediately stop. An essential element of the crime of attempting to elude a pursing police vehicle is that the

defendant willfully failed or refused to immediately bring his vehicle to a stop. RCW 46.61.024(1); CP 111 (Instruction 7); State v. Tandecki, 153 Wn.2d 842, 848, 109 P.3d 398 (2005); State v. Perez, 166 Wn. App. 55, 61, 269 P.3d 372 (2012).

Officer Sargent turned on his emergency lights to signal Mr. Cargill to pull over when Mr. Cargill was stopped at a red light at the intersection of 172nd and 51st Streets. 1RP 41-42. Mr. Cargill turned onto 52nd and pulled onto the shoulder as soon as possible. 1RP 43, 51-51.

Mr. Cargill thus immediately brought his vehicle to a stop upon Officer Sargent's signal. His conviction must therefore be reversed in light of the State's failure to prove this element of the crime beyond a reasonable doubt.

c. The State did not prove beyond a doubt that Mr. Cargill drove in a reckless manner in order to elude a pursing police vehicle. In addition, the State was required to prove beyond a reasonable doubt that Mr. Cargill drove "in a reckless manner while attempting to elude a pursuing police vehicle." RCW 46.61.024(1). "[T]he expression 'while attempting to elude a pursuing police vehicle' modifies only the element that specifies the criminal manner of driving which ensues

after the driver's willful failure to stop." Stayton, 39 Wn. App. at 50 (emphasis omitted). The only reckless driving in this case occurred when Mr. Cargill was not being pursued by a police car.

The State argued to the jury that Office Sargent was still pursuing Mr. Cargill even though he had terminated his pursuit and was not attempting to catch Mr. Cargill. 2RP 71, 79-80. Determining whether Mr. Cargill was attempting to elude a pursuing police vehicle requires this Court to interpret the language of RCW 46.61.024, specifically what is meant by a "pursuing police vehicle."

Statutory interpretation is an issue of law reviewed de novo. State v. K.L.B., ___ Wn.2d ___, 2014 WL 2895451 at *2 (No. 88270-3, 6/26/14). The court's primary duty in interpreting a statute is to "discern and implement the intent of the legislature." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The first step in statutory interpretation is to look at the plain language of the statute. K.L.B., 2014 WL 2895451 at *2; J.P., 149 Wn.2d at 450. "If the statute is unambiguous, meaning it is subject to only one reasonable interpretation," the court's inquiry ends. K.L.B., 2014 WL 2895451 at *2; accord J.P., 149 Wn.2d at 450. The court resorts to principles of statutory construction only if the statute is

ambiguous. State v. Armedariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The term "pursuing police vehicle" is not defined in the eluding statue or elsewhere in RCW Title 46.[2] When words of a statute are not defined, they are given their common dictionary meaning. State v Pacheo, 125 Wn.2d 150, 154, 882 P.2d 183 (1994); State v. Argueta, 107 Wn. App. 532, 536, 27 P.3d 242 (2001). Using the common meaning of pursuit, the record shows that Mr. Cargill was not being pursued by a police car when he drove in a reckless manner and thus did not do so in order to elude a pursuing police vehicle.

"Pursue" means to chase or follow something, usually in order to catch it. Webster's Third New International Dictionary Unabridged, p. 1848 (1993) ("To follow with enmity; to follow usually determinedly in order to capture, kill or defeat.") Dictionary.com Unabridged[3] (based upon the Random House Dictionary) ("to follow in order to overtake, capture, kill, etc.); World English Dictionary[4] ("to follow (a fugitive, etc) in order to capture or overtake"). Black's Law Dictionary similarly defines "pursuit" as "the act of chasing to overtake

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[2] "Vehicle" is defined at RCW 46.04.670.

[3] Found at http://dictionary.reference.com/borwse/puruse?s=ts.

[4] Found at http://dictionary.reference.com/borwse/puruse?s=ts.

or apprehend." Black's Law Dictionary, p. 574 (Second Pocket Ed. 2001).

The police officer's testimony was consistent with the common understanding of the term "pursuing police vehicle." Officer Sargent testified that after Mr. Cargill drove off, the officer's supervisor told him to terminate his pursuit. 1RP 48-49, 56. Officer Sargent related that "terminate," means to "stop a pursuit." 2RP 49. The officer followed Mr. Cargill for several blocks, but was only documenting his direction of travel. The officer was not trying to catch up to Mr. Cargill. 2RP 49, 56. Instead, Officer Sargent checked on motorists pulled to the side of the road to determine if they were injured or involved in a collision. 2RP 49-50, 54-55. Officer Sargent testified:

> Q: What's the difference between following and continuing to pursue the defendant?
>
> A: I was following to document his behavior. Also, in case a collision did happened, I would be able to be a first responder. Pursuing would be more I was aggressively trying to capture that individual.
>
> Q: And I believe you indicated on direct at that time you determined it was too dangerous to pursue?
>
> A: Correct.
>
> Q: That you terminated the pursuit?
>
> A: My sergeant terminated the pursuit.

2RP 56.

Officer Sargent terminated his pursuit of Mr. Cargill as soon as Mr. Cargill drove away, and he made no attempt to stop or catch up to Mr. Cargill's vehicle. Thus, while Mr. Cargill may have driven in a reckless manner, there was no pursuing police vehicle. The State thus did not prove beyond a reasonable doubt that Mr. Cargill drove "while attempting to elude a pursuing police vehicle." RCW 46.61.024(1).

d. Mr. Cargill's conviction must be reversed. The defendant may not be convicted unless the evidence supports every element of the crime beyond a reasonable doubt. Mr. Cargill stopped immediately upon being signaled by a police vehicle to stop. When he then drove away from the stop in a reckless manner, there was no police vehicle chasing him. The State thus did not prove beyond a reasonable doubt that Mr. Cargill failed to immediately stop or that he drove in a reckless manner in order to elude a pursuing police vehicle, two essential elements of the crime. Mr. Cargill's conviction for attempting to elude a pursuing police vehicle must be reversed and must be dismissed. See State v. Hudson, 85 Wn. App. 410, 405, 932 P.2d 714 (1997).

2. **Prosecutorial misconduct in closing argument denied Mr. Cargill his constitutional right to a fair trial.**

In closing argument, the deputy prosecuting attorney exaggerated and misstated the evidence in a manner that prejudiced Mr. Cargill's case and violated his constitutional right to a fair trial. This misconduct was flagrant and ill-intentioned, and Mr. Cargill's conviction should therefore be reversed.

a. Misconduct by the prosecutor may violate a defendant's constitutional right to a fair trial. A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Washington courts have long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for professional conduct in closing argument. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to

due process and a fair trial may be violated. Monday, 171 Wn.2d at 676; Charlton, 90 Wn.2d at 664-65.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must first decide if the comments were improper and, if so, whether a "substantial likelihood" exits that the comments affected the jury verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice could not have been cured with a limiting instruction. Id. at 760-61.

b. The prosecutor committed misconduct by arguing facts that were not in evidence. While a prosecutor is permitted to argue reasonable inferences from the evidence, he may not misstate the evidence or argue facts not admitted at trial. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); RPC 3.4(e). In addition, the prosecutor may not argue in a manner that inflames the passions or prejudices of the jury. Monday, 171 Wn.2d at 678; Belgarde, 110 Wn.2d at 507-10; American Bar Association Criminal Law Section, Standards for Criminal Justice: Prosecution Function, Standard 3-5.8

(3rd ed. 1993). These two rules are "closely related . . . because appeals to the jury's passion and prejudice are often based on matters outside the record." State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158, rev. denied, 175 Wn.2d 1025 (2012) (citing Belgarde, supra, and State v. Claflin, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984), rev. denied, 103 Wn.2d 1014 (1985)). The prosecutor violated these principles by misrepresenting the police officer's testimony and making unsupported assumptions about Mr. Cargill's state of mind.

Eluding does not require specific intent to elude the police. RCW 46.61.024(1); State v. Gallegos, 73 Wn. App. 644, 650, 871 P.2d 621 (1994). Instead, the State need only prove that the defendant willfully failed to stop and drove in a reckless manner while trying to elude. Id. The deputy prosecuting attorney, however, began his argument by informing the jury that Mr. Cargill knew he had warrants for his arrest and intentionally stopped his car so that he could escape and avoid arrest when the police officer got out of his car. 2RP 68-69. The prosecutor even asserted that Mr. Cargill intentionally used the child in his car "as a shield." 2RP 69.

There is no evidence to support the prosecutor's speculation about Mr. Cargill's intent. There is no evidence that Mr. Cargill knew

of the arrest warrants. Nor was there any evidence that he stopped so that he could drive off when the officer was out of the car. Instead, the record shows that Mr. Cargill did not drive away until after the officer pulled his weapon and informed Mr. Cargill he was under arrest. 1RP 43-46. In addition, the officer was not aware of the child until Mr. Cargill mentioned the fact to him and the officer then holstered his weapon for safety. 1RP 52. Officer Sargent did not testify he had any reason to believe Mr. Cargill was armed or dangerous.

The prosecutor's argument, based upon his own negative assumptions about Mr. Cargill's thought process, was designed to make Mr. Cargill look like a dangerous criminal. The argument thus both appealed to the juror's fear and prejudices about criminals and people who endanger children and was not based upon reasonable inferences from the evidence. In Pierce, the prosecutor' closing argument included his own speculation about the defendant's thought process and a fabricated story about how the murder victims must have struggled and pleaded for mercy. Pierce, 169 Wn. App. at 537, 553-542. The prosecutor's argument as to the defendant's thought process before the crimes was an "improper appeal to the passion and prejudice of the jury based on facts outside the evidence." Id. at 554. "[T]he prosecutor

inflamed the prejudice of the jury against Pierce by attributing repugnant and amoral thoughts to him – thoughts that were based on the prosecutor's speculation and not the evidence." Id. The prosecutor engaged in the same form of misconduct in Mr. Cargill's case.

The prosecutor's inability to stay within the facts of the case is also seen in his assertions that Mr. Cargill's driving created a "path of destruction." 2RP 71, 79. The evidence produced at trial showed that no person or property was hurt as a result of Mr. Cargill's driving. Officer Sargent testified that several cars drove to the side of the road in order to avoid a collision with Mr. Cargill. 1RP 47-48. The officer, however, checked with motorists who pulled over and none of them were hurt and no vehicles were damaged. 1RP 50, 53. There was no "path of destruction."

When arguing in favor of the aggravating factor, the prosecutor referred to the child in Mr. Cargill's car as "the baby" even though Officer Sargent estimated that the child in the vehicle was approximately 2-to-3 years old. 1RP 46; 2RP 72. Like the prosecutor's discussion of Mr. Cargill's purported intent, the use of this deceptive word was designed to arouse the juror's prejudice against those who endanger young children.

The deputy prosecutor also misrepresented the evidence when he argued that Mr. Cargill was driving so fast that the police officer could not catch him. 2RP 78. In fact, Officer Sargent testified that he was not trying to catch Mr. Cargill at all. Instead, he followed Mr. Cargill determine his direction of travel and to aid the motorists who had pulled for Mr. Cargill if needed. 1RP 49-50, 56.

The prosecutor misrepresented the facts presented at trial in a manner that was inflammatory and part of the prosecutor's improper design to show Mr. Cargill was a dangerous criminal who, fleeing arrest, cared nothing for the safety of others, including his young passenger. The prosecutor improperly related his theory of Mr. Cargill's intent to the jury. His discussion of a path of destruction, a baby in the car, and the police officer's inability to catch up to Mr. Cargill was similarly not supported by the evidence. The prosecutor improperly used his closing argument to appeal to the jurors' fear, thus encouraging a decision based upon their emotions and prejudices rather than the facts of the case. See State v. Perez-Mejia, 134 Wn. App. 907, 916, 920, 143 P.3d 838 (2006). The prosecutor's appeal to the juror's antipathy for criminals who endanger others and references to Mr. Cargill's intent and other facts not in the record constituted misconduct.

c. Mr. Cargill's conviction must be reversed. Defense counsel did not object to the prosecutor's frequent misstatements of the evidence, presumably to avoid highlighting the improper argument. This Court must therefore determine if the misconduct was so flagrant and ill-intentioned that no objection or curative instruction would have cured the prejudice. Belgarde, 110 Wn.2d at 508. It was flagrant and ill-intentioned for the prosecutor to misrepresent the evidence presented at trial.

A curative instruction is not a guarantee that the prejudice caused by prosecutorial misconduct is cured. See State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996) (addressing whether defendant prejudiced by misconduct even when curative instruction given); State v. Bozovich, 145 Wash. 227, 233, 259 Pac. 395 (1927) (defendant's prompt objections and court's curative instructions could not obviate prejudice when prosecutor had elicited defendant's other bad acts in cross-examination of defendant's character witnesses); State v. Stith, 71 Wn. App. 14, 21-23, 856 P.2d 415 (1993) (court's strongly-worded curative instruction could not cure prejudice where prosecutor's remarks struck at the heart of the right to a fair trial before an impartial jury). Moreover, the cumulative effect of repetitive

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71291-8-I
	)	
	)	
JOSHUA CARGILL,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUL 18 PM 3:02

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	JOSHUA CARGILL 788283 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 17TH DAY OF JULY, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711