No. 47136-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DALE HARVEY OYA, III,

Appellant.

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

APPELLANT REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. CLARIFICATION OF THE RECORD

The Rules of Appellate Procedure require that a respondent's brief, like the appellant's brief, contain "a fair statement of the facts and procedure relevant to the issues presented for review." RAP 10.3(a)(5); 10.3(b). In this appeal, Daniel Oya has challenged: 1) the trial court's denial of his motion to sever, 2) the introduction of a non-testifying declarant's hearsay, and 3) the sufficiency of the evidence of hit and run, attempted eluding, and a special endangerment verdict. This portion of the reply seeks to set the record straight regarding facts omitted from the State's response.

1. Omissions that mischaracterize the alleged hit-and-run.

The State's pleading discusses what witnesses Lacee and Connie Sharp saw about the alleged hit-and-run, but omits the fact that Lacee made clear she did not see actual contact. 4RP 346, 357.[1] The State omits the fact that Lacee testified that when the van circled back, it stopped. 4RP 358. The State omits the fact that Lacee testified that as the van's driver circled back, its driver avoided a path that would have hit Angel Boyd. 4RP 358. The State omits the fact that Lacee testified

[1] Compare with: "Lacee Sharp and her mother Connie Sharp were returning from the movies when they saw a van strike Angel Boyd. 4RP 348." BOR at 2.

that she did not see the driver acting aggressively. 4RP 365.[2] Similarly, the State omits the fact that Connie also testified that there was nothing dramatic going on, that the woman and the driver were simply talking, arguing. 4RP 371, 374, 378.[3]

In discussing witness Gabriealla Lopez, the State omits the fact that her suggestion the van drove again and again over Ms. Boyd "all of the way over her… over her legs… [c]ompletely ran over her," is not credible. 3RP 286, 289-90, 296-97; BOR at 3. Ms. Boyd walked away from the scene essentially unharmed and declined aid: "I know that there was nothing wrong with me." 3RP 212.

The State omits from its statement of the case the fact that Ms. Boyd appeared as a witness at trial. Under oath, she testified that she was on drugs the day she interacted with the police out-of-court. 3RP 203-04. Ms. Boyd testified she ran out in front of the van and that what happened was an accident, not an intentional act, but the State omits

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[2] Compare with State assertion that Lacee Sharp saw the van drive back around, "and there were 'words exchanged' before the van drove off as fast as it could. 4RP 350." BOR at 2.

[3] Compare with the State assertion that Connie Sharp testified about witnessing "some type of altercation. 4RP 372." BOR at 2.

this testimony. 3RP 207-08, 236, 240.[4] The State omits the critical fact that the jury acquitted Mr. Oya of assault. CP 74.

2. Omissions that mischaracterize the importance of the non-testifying witness's hearsay to the case.

"George's testimony has nothing to do with either of defendant's arguments regarding the elude charge at trial or now on appeal," says the State in its response. BOR at 16. This is a misstatement of the record.

At trial, Mr. Oya's counsel objected to the introduction of this hearsay and the objection was overruled. 4RP 412. The trial prosecutor repeatedly argued in closing that the non-testifying passenger's hearsay – as recounted in court by Officer Waddell – showed Mr. Oya was guilty of eluding and that the special verdict of endangerment had been established. The trial prosecutor relied on the non-testifying passenger's hearsay to argue that Mr. Oya was knowingly eluding, had driven recklessly, and had endangered his passenger's safety.

> He has somebody else in the car with him, and he knows that he is going to get pulled over. He tells his passenger that. He looks back at Officer Waddell after Officer Waddell draws down on him and tells him to get out, and he makes the decision at that

[4] Compare with recitation of police officer's unsworn hearsay account of what Ms. Boyd allegedly said to him at the scene, suggesting she was the victim of an intentional assault. BOR at 4.

point to put on the gas pedal and take off. He knows what he is doing here. He is endangering the life of his passenger by doing so.

5RP 540 (emphasis added).

He clearly had an opportunity to stop with his passenger, but his passenger wanted to get out. He didn't do that. He kept going. Officer Walsh then had to pursue him.

5RP 541 (emphasis added).

Number five, that while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner...

You also heard that he has a passenger in his car, right? The passenger bails out. The passenger told Officer Waddell he didn't want any part of this. He wanted out, right? So, the point where he won't even stop to let a passenger out, someone who is not driving, someone who is not -- trying to get away from two marked police cars with two officers who had guns drawn, he has him in his car. He is at this point very much indifferent to consequences.

5RP 482-83 (emphasis added).

The special verdict on this crime involves endangerment to a person other than the defendant or the pursuing police officers. The person who is endangered here is the passenger. The passenger was threatened with physical injury or harm by the actions of the defendant during the attempted elude. We know that the car was driving at high speeds. We know that the car was taking corners fast, and we know from Officer Waddell the passenger did not want to be in this.

5RP 484 (emphasis added).

There are two pursuing police vehicles behind the defendant at this point. How does he know that they are going to stop? How do you know they are not going to hit the passenger? His actions

> have endangered that passenger who stated that he wanted nothing to do with this. The defendant knew that he was going to get stopped. He told the passenger that. He said, we are going to get stopped. I'm going to get pulled over. The passenger told Officer Waddell that. The defendant knew. The defendant knew that the police were after him. Of course, he does. Again, we know from earlier, injured his girlfriend, left her at the gas station. So, the defendant's actions were knowingly. He knew what he was doing. He placed his passenger in peril. Because of that, the State asks you to return a special verdict on Count III, that the passenger of the vehicle was endangered...

5RP 485 (emphasis added).

3. Omissions that mischaracterize the alleged eluding.

Finally, in its discussion of the alleged eluding, the State leaves out law enforcement testimony that Mr. Oya did not drive the van in a reckless fashion. Officer Waddell, for example, testified that before the passenger jumped out, the minivan was not speeding. 4RP 409-10, 424, 440. Based on what Officer Waddell saw, the driver was "following the traffic laws." 4RP 424. Likewise, Officer Walsh testified that during the pursuit, the driver maintained full control over the vehicle, did not drive into oncoming traffic or collide with anyone or anything. 3RP 330, 332. The minivan slowed down for turns and when it finally pulled over, it did so safely. 3RP 321, 331, 335. 339.[5]

[5] Compare with BOR at 5, 25-26.

B. ARGUMENT IN REPLY

1. The denial of the motion to sever deprived Mr. Oya of his right to a fair trial.

Mr. Oya stands by his argument that he did not get a fair trial because the varying offenses were joined. AOB at 13-25. The State's position is unpersuasive, in part because the State's assertion that "[t]here was no danger of the jury not being able to compartmentalize the evidence for each count" is without support. BOR at 9.

"Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). This danger of prejudice exists even if the jury is properly instructed to consider the crimes separately: "prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one." State v. Harris, 36 Wn.App. 746, 750, 677 P.2d 202 (1984).

Neither charge was particularly strong; the State is wrong to claim otherwise. BOR at 9. The jury acquitted on the assault and both the hit and run and eluding convictions are not supported by sufficient evidence. AOB at 35-42. Neither is the special verdict of endangerment. AOB 42-44.

The State's claim that "there is no indication that there were any problems in terms of the clarity of defenses" makes no sense. BOR at 9, 10. Mr. Oya wanted to testify about the eluding count and the special allegation linked to it. AOB 17. His defense counsel made a specific offer of proof that Mr. Oya wanted to tell the jury that he was not driving recklessly and had not put people in danger, as a counternarrative to what the police witnesses were saying about him. 2RP 47. The State's suggestion that there was no prejudice because Mr. Oya's lawyer defended against the charges without Mr. Oya's testimony utterly devalues Mr. Oya's constitutional right to testify.

The claim the evidence would be cross-admissible is wrong too. BOR at 10. Identity was not at issue with respect to the hit-and-run charge: Ms. Boyd identified him as the driver and she knew him well. His identity as the driver of the minivan at the time of the alleged eluding also was not at issue: the officers arrested him behind the wheel.[6] Even if a jury deciding the eluding charge would find out that Mr. Oya was wanted by the police, there would be no need for them to know specifically what he was wanted for. And, the claim that the

[6] Later on in the pleading, the State seems to grasp this, writing: "Defendant does not contest that he was the driver of the van..." BOR at 23.

alleged eluding was "flight" and thus evidence of guilt, is belied by the fact that Mr. Oya was openly driving the van relatively close to where the alleged hit-and-run occurred. Even when evidence of flight is admissible, it tends to be only marginally probative to the ultimate issue of guilt or innocence. State v. Freeburg, 105 Wn. App. 492, 498, 20 P.3d 984 (2001) (footnote and internal quotations omitted). See also AOB 21-23.

2. The trial court erred in admitting a non-testifying declarant's hearsay statement in violation of Mr. Oya's Sixth Amendment right to confrontation.

The State attempts to deflect attention from the Sixth Amendment right to confrontation violation below by suggesting that trial counsel's failure to lodge the proper objection was a legitimate trial strategy. BOR at 20. This position also makes no sense.

The State acknowledges that a contemporaneous objection was made. BOR at 15. But, with respect to the failure to lodge a proper constitutional objection, the State writes: "This does not constitute ineffective assistance of counsel, but a difference in trial tactics and strategy." BOR at 20.

Does the hearsay objection not demonstrate that defense counsel's intent was to keep the evidence out? Mr. Oya's lawyer settled

on a trial strategy – to keep the non-testifying passenger's words out of court – but failed to achieve this aim by only making a hearsay objection. The failure to defend Mr. Oya on a proper constitutional basis was deficient performance, not a change of tactics or strategy.

As pointed out in the clarification of facts section, the State is wrong about the claim that the non-testifying passenger's hearsay "has nothing to do with either of defendant's arguments regarding the elude charge at trial or now on appeal." BOR at 16.

At trial, the State focused on the circumstances of how the passenger left the van to argue that Mr. Oya had endangered him. 5RP 482-85, 540-41. This prosecutorial inference that the passenger was escaping Mr. Oya's minivan to save himself from harm is what the State continues to press on appeal: "the evidence was that defendant's passenger flung himself from the van." BOR at 27. Here, the Sixth Amendment error was real and it was prejudicial.[7]

[7] It is unclear to undersigned counsel why the State's response brief includes a section titled "No prejudice can be presumed to result from the decision not to call the alleged alibi witness." BOR at 21. The passenger was not an alibi witness and there is nothing in the record to suggest there was any "decision" by anyone not to call him. It could be this heading title comes from a brief the State filed in some other case.

3. The State did not prove beyond a reasonable doubt that Mr. Oya committed a hit and run, or the attempted eluding, or the special endangerment verdict.

Curiously, the State attempts to defeat Mr. Oya's sufficiency challenge to the hit and run conviction by suggesting that the burden of proof in this criminal case ought to be reversed: "The State does not need to prove all four of these statutory requirements." BOR at 23. However, the State's response brief has no citation to, let alone discussion of, State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998), and perhaps this is why it misperceives the legal issue. (BOR at iii-v.)

Below, the State took on the burden of proving that Mr. Oya "failed to satisfy his obligation to fulfill all of the following duties." Instruction No. 14, CP 61 (listing four statutory duties, in the conjunctive). Under Hickman, elements added without objection to the "to convict" instruction become the "law of the case" and must be proved beyond a reasonable doubt. 135 Wn.2d at 99. If the State failed to meet this burden with respect to the added element, the conviction must be dismissed. Id. at 103. AOB 35-38.

On appeal, the State writes "the evidence was that defendant fled the scene of the accident and did not stop to render aid to Boyd." BOR at 24. That is not what the evidence stated. The evidence was that

he did come around and stop and that he did offer aid to Ms. Boyd. E.g. 4RP 358, 370; 3RP 208, 239.

Even the trial prosecutor conceded this in closing argument:

> Well, theoretically, he stopped, right. He came back around, and he stopped by Ms. Boyd when they have this altercation. Theoretically, he did stop right after the accident.

5RP 475-76 (emphasis added).

As explained in the opening brief, for this reason alone, the conviction should be reversed and dismissed.

Moreover, the conviction cannot stand under State v. Teuber, 19 Wn. App. 651, 577 P.2d 147, review denied, 91 Wn.2d 1006 (1978). One thing that the State does get right in its response is acknowledge that the State v. Teuber "reasoning may be applicable to this case in terms of the name, license, and insurance requirements." BOR at 24. But this is reason to find the evidence insufficient, not the other way around. AOB 37-38.

The State's citation to State v. Perez, 166 Wn. App. 55, 61, 269 P.2d 372 (2012), only underscores the lack of sufficient evidence of reckless driving in Mr. Oya's case. BOR at 25. Perez drove twice the speed limit and endangered a pedestrian before running a stop sign. When Mr. Oya drove the minivan away from the pursuing officers,

there is no indication that anyone was endangered at all. The pursuing officer, Officer Walsh testified that there were no near collisions with any people or property. 3RP 330. His report made no mention of near collisions with vehicles, because, he "wasn't going to mention something that didn't happen." 3RP 332.

C. CONCLUSION

For all of the reasons set out above and in the appellant's opening brief, Mr. Oya's convictions for hit and run injury and attempted eluding should be reversed and dismissed, as should the special verdict. In the alternative, a new, fair trial should be ordered.

DATED this 7th day of March 2016.

Respectfully submitted,

/s Mick Woynarowski

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Attorneys for Appellant

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	)	
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	)	
DALE OYA III,	)	
	)	
Appellant.	)	

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