IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHARLES THOMAS SORENSEN, Plaintiff.	No. 46168-4-II UNPUBLISHED OPINION

JOHANSON, C.J. — Charles Thomas Sorensen appeals his stipulated facts trial convictions for felony driving under the influence (DUI), attempting to elude a pursuing police vehicle, second degree driving while license suspended or revoked, operation of a motor vehicle without ignition interlock device, and obstructing a law enforcement officer. He argues that (1) the evidence was insufficient to support the attempting to elude conviction because it did not establish that he was driving in a reckless manner, (2) the trial court erred in denying his CrR 3.6 motion to suppress, and (3) the trial court erred in ordering him to pay certain legal financial obligations (LFOs). In a statement of additional grounds for review[1] (SAG), Sorensen raises additional issues related to the denial of the suppression motion and sufficiency of the evidence to support the attempting to elude conviction. We hold that (1) the evidence was sufficient to support the attempting to elude

[1] RAP 10.10.

conviction, (2) the trial court did not err in denying the suppression motion, and (3) Sorensen waived his challenge to the LFO requiring him to pay costs for his appointed counsel. We affirm the convictions, but we accept the State's concession that the trial court's imposition of an LFO requiring Sorensen to pay a $100 contribution to the Kitsap County expert witness fund was error and remand to the trial court to strike this LFO.

FACTS

I. BACKGROUND[2]

At about 9:50 PM, on October 30, 2013, Jack Kimbrel was stopped at a stop sign located at the intersection of Sedgwick and Banner Road when he observed Sorensen drive around his vehicle, across Sedgwick, and off the roadway. Kimbrel called 911 and reported the collision.

Trooper Joren Barraclough arrived at Sedgwick and Banner Road 10 minutes later and saw Sorensen attempting to drive his truck out of what appeared to be a ditch. When Sorensen backed out onto Sedgwick, Trooper Barraclough observed grass and branches hanging from the truck's bumper. There was no traffic on Sedgwick at this time.

Sorensen then drove westbound on Sedgwick Road. Trooper Barraclough believed Sorensen had been involved in a collision and wanted to check to be sure Sorensen was able to drive. The trooper also believed that Sorensen had committed the traffic infractions by blocking the roadway and by driving with his wheels off the roadway. Accordingly, Trooper Barraclough activated his lights and attempted to stop Sorensen.

[2] The background facts are drawn from the stipulated facts.

Instead of stopping, Sorensen continued down Sedgwick at 50 m.p.h. while weaving within the lane and touching both the fog and centerlines. The speed limit in this area was 45 m.p.h. Trooper Barraclough continued to follow and turned on his siren when they approached Long Lake Road. Instead of stopping, Sorensen made a wide turn without signaling and nearly drove over an embankment. While driving down Long Lake Road, Sorensen continued to weave within the lane; he also crossed the fog line and the centerline. Sorensen then turned onto Clover Valley Road and stopped about 2.7 miles from where the pursuit started. Trooper Barraclough had pursued Sorensen for approximately three minutes.

After Sorensen stopped, he refused to comply with Trooper Barraclough's order to exit his vehicle. When Sorensen finally left his vehicle, he continued to refuse to comply with the trooper's instructions. Sorensen also appeared to be intoxicated. Following his arrest, officers advised him of his *Miranda*[3] rights, and Sorensen told them that although he had seen the trooper's lights and heard the siren, he did not stop because he did not want to get in trouble and was just trying to get home. A blood test later showed that Sorensen's blood alcohol level was .27.[4]

II. PROCEDURE

The State charged Sorensen with several offenses, including attempting to elude a pursuing police vehicle. Sorensen pleaded not guilty.

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] Although Sorensen was required to have an ignition interlock device, his truck was not equipped with one. Additionally, his driver's license had been revoked.

A. SUPPRESSION MOTION

Sorensen moved to suppress all evidence in the case, arguing that he was unlawfully seized when Trooper Barraclough activated his emergency lights. At the suppression hearing, Trooper Barraclough testified for the State, and Kimbrel testified for Sorensen.

Trooper Barraclough testified that on the night of the incident, he was dispatched to a call reporting a "[o]ne vehicle unknown, injury collision." Report of Proceedings (RP) (Mar. 5, 2014) at 8. The dispatcher did not provide a description of the vehicle involved.

Trooper Barraclough arrived at the scene approximately 10 minutes later. When he arrived, he saw a white truck facing northbound in the westbound lane; the truck's bed was blocking the westbound lane. The truck's front tires were off the roadway and on the shoulder in "a slight depression" or "ditch." RP (Mar. 5, 2014) at 9. The truck reversed out of the ditch and continued westbound toward the trooper. There was no other traffic at this time.

As the truck approached, Trooper Barraclough noticed "some branches and leaves and everything that had been stuck on the front bumper of the truck." RP (Mar. 5, 2014) at 9-10. When the truck passed him, the trooper turned around, followed the truck, and turned on his emergency lights in an attempt to stop the truck.

Trooper Barraclough testified that he wanted to stop the truck because it "had been traveling with its wheels off the roadway and also been blocking the roadway." RP (Mar. 5, 2014) at 10. He further testified that because he had been dispatched to a "collision," he wanted to be sure the driver was okay and there was no other property damage. The trooper believed the truck had been in an accident because its wheels had been off the roadway in the ditch and there was brush in the truck's bumper.

When the truck did not stop, Trooper Barraclough turned on his siren. The truck still did not stop. While driving behind the truck, the trooper observed it "continually cross[ ]" the center and fog lines and weave within its lane. RP (Mar. 5, 2014) at 11. Based on this, the trooper concluded that the driver was likely impaired. When the truck finally stopped, the trooper determined that Sorensen was the driver.

Kimbrel testified that he had made the 911 call reporting "an accident on Sedgwick," in which the vehicle had "hit a ditch" or a hill. RP (Mar. 5, 2014) at 54, 59. He stated that he was stopped at the intersection of Banner and Sedgwick when Sorensen drove around him, crossed Sedgwick, and "smashed into a driveway." RP (Mar. 5, 2014) at 55. He told the 911 dispatcher the vehicle was a Toyota truck.

Based on this testimony, the trial court issued a memorandum opinion denying the motion to suppress. The trial court found that (1) the initial seizure, which occurred when the trooper first activated his emergency lights, was not a valid *Terry*[5] stop, but (2) the seizure became lawful because the trooper later had probable cause to believe that Sorensen had violated RCW 46.61.024, the attempting to elude statute.

B. STIPULATED FACTS BENCH TRIAL AND SENTENCING

The case proceeded to a stipulated facts bench trial. Based on the facts set out above, the trial court found Sorensen guilty as charged.

After the trial court signed the findings of fact and conclusions of law, defense counsel advised the trial court that he had an order appointing counsel for appeal, that Sorensen had

[5] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

previously been found indigent, and that Sorensen was still indigent and would not be able to afford any costs related to an appeal. Neither the parties nor the court mentioned ability or inability to pay LFOs. The trial court imposed LFOs, including $1,135 for his court-appointed counsel, and $100 "Contribution-Kitsap County Expert Witness Fund [Kitsap County Ordinance 139.1991]." Clerk's Papers (CP) at 307 (alteration in original).

Sorensen appeals his convictions and the court-appointed counsel and witness fund contribution LFOs.

ANALYSIS

Sorensen argues that (1) the evidence was insufficient to support the attempting to elude conviction, (2) the trial court erred when it denied his motion to suppress, and (3) the trial court erred in imposing certain LFOs. In his SAG, he raises additional issues related to the sufficiency of the evidence and the trial court's denial of the suppression motion.

I. SUFFICIENCY OF THE EVIDENCE: ATTEMPTED ELUDING

Sorensen first argues that the evidence was insufficient to support the attempting to elude conviction because the State failed to establish beyond a reasonable doubt that he was driving in a reckless manner. In his SAG, he further argues that the evidence was insufficient because the State failed to establish beyond a reasonable doubt that he was "attempting to elude" the trooper. These arguments fail.

A. STANDARD OF REVIEW

We review sufficiency of the evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105,

330 P.3d 182 (2014). A sufficiency challenge admits the truth of the State's evidence and all reasonable inferences drawn from it. *Homan*, 181 Wn.2d at 106 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

B. RECKLESS MANNER

RCW 46.61.024(1) provides in part,

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop *and who drives his or her 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.

(Emphasis added.) "[D]riving 'in a reckless manner' means 'driving in a rash or heedless manner, indifferent to the consequences.'" *State v. Roggenkamp*, 153 Wn.2d 614, 622, 106 P.3d 196 (2005) (quoting *State v. Bowman*, 57 Wn.2d 266, 270, 271, 356 P.2d 999 (1960)).

Sorensen asserts that the evidence showed only that he (1) drove 50 m.p.h. in a 45 m.p.h. speed zone, (2) he wove within his lane, touching the center and fog lines, (3) he made a wide turn without signaling and almost drove over an embankment, and (4) he subsequently drove over the center and fog lines.[6] And he argues that "[i]n the absence of any other vehicle or pedestrian traffic, this evidence is insufficient to prove that [he] drove in a reckless manner" because it did not establish "rash or heedless driving" or "show indifference to consequences." Br. of Appellant at 9.

[6] Sorensen also notes that the evidence showed he drove through a stop sign and off the roadway prior to the trooper's arrival. Because these things happened before the pursuit, they are irrelevant to the attempted eluding charge, and we do not consider these facts.

Sorensen cites no authority establishing that the reckless driving must place any person or property in actual danger.[7] Thus, Sorensen does not show that the absence of other vehicles or pedestrians precludes a finding that he drove in a reckless manner. Furthermore, even under the higher willful and wanton standard,[8] the State is not required to prove that anyone else was actually endangered by Sorensen's conduct. *State v. Whitcomb*, 51 Wn. App. 322, 327, 753 P.2d 565 (1988).

The trial court could have reasonably concluded that weaving within a lane or driving a mere five m.p.h. over the speed limit was not driving in a reckless manner, but that was not all the trooper observed. Sorensen also turned without signaling in a manner that nearly caused him to drive over an embankment, crossed over both the fog and center lines of the roadway, and was driving while intoxicated. Although he was not driving at highly excessive speeds, these additional facts demonstrated that he was unable to safely control his vehicle, which put other persons and property at risk of harm. These facts would allow a rational trier of fact to conclude that Sorensen was driving in a rash or heedless manner, indifferent to the consequences. Accordingly, Sorensen failed to establish that there was insufficient evidence that he drove in a reckless manner and this argument fails.

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[7] The case he cites for support, *State v. Naillieux*, 158 Wn. App. 630, 643-45, 241 P.3d 1280 (2010), is inapposite because it addresses the sufficiency of a charging document, not the sufficiency of the evidence.

[8] *State v. Ridgley*, 141 Wn. App. 771, 781, 174 P.3d 105 (2007) ("reckless manner" standard contemplates a lesser mental state than that of the "willful or wanton" standard).

C. ATTEMPT TO ELUDE

In his SAG, Sorensen further argues that the evidence did not prove that he was "attempting to elude" the trooper. He asserts that at best he failed to yield, that he was just on his way home, that there was no evidence that he was attempting to flee or avoid the trooper, and that he pulled over on his own accord.

RCW 46.61.024(1) requires that the State prove that the defendant "dr[ove] his or her vehicle in a reckless manner *while attempting to elude* a pursuing police vehicle." (Emphasis added.) Sorensen's statement that he did not stop despite seeing the trooper's lights and hearing the siren because he did not want to get in trouble is sufficient to support a finding that Sorensen was attempting to elude. Accordingly, this argument fails.

II. MOTION TO SUPPRESS

Sorensen next argues that the trial court erred in denying his motion to suppress. He asserts that the trial court improperly concluded that although Trooper Barraclough did not initially have authority to attempt to seize him (Sorensen), his act of fleeing in a reckless manner provided an independent basis for the seizure. In his SAG, Sorensen further contends that the trial court erred in denying the suppression motion because it considered whether he was "attempting to avoid" rather than "attempting to elude" the trooper and because there could have been other reasons that he failed to immediately stop his vehicle. These arguments fail.

A. STANDARD OF REVIEW

We review a trial court's decision on a motion to suppress to determine whether the findings are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). We defer to the

trier of fact on "issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). We review conclusions of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

B. INDEPENDENT BASIS FOR SEIZURE

Sorensen argues that the trial court erred in finding that the seizure was supported by an independent basis, namely his reckless flight. We disagree.

"The constitutional right to be free from unreasonable searches and seizures does not create a constitutional right to react unreasonably to an illegal detention." *State v. Mather*, 28 Wn. App. 700, 703, 626 P.2d 44 (1981); *see also State v. Kolesnik*, 146 Wn. App. 790, 810, 192 P.3d 937 (2008); *State v. Duffy*, 86 Wn. App. 334, 340, 936 P.2d 444 (1997). Regardless of whether the initial attempt to stop Sorensen was illegal, reckless flight is prohibited; it is the nature of the defendant's behavior after the police initiate the stop that is at issue, not whether the trooper had the authority to make the stop in the first instance. *State v. Malone*, 106 Wn.2d 607, 611, 724 P.2d 364 (1986); *Duffy*, 86 Wn. App. at 340-41; *State v. Brown*, 40 Wn. App. 91, 96-97, 697 P.2d 583 (1985). Thus, the trial court did not err when it concluded that Sorensen's act of fleeing in a reckless manner provided an independent basis for the seizure.

Sorensen argues that unlike in *Duffy*, he did not drive with a wonton and willful disregard for the lives or property of others. We acknowledge that *Duffy* and the other relevant cases refer to the "wanton or wilful disregard for the lives or property of others" standard that was applicable under former RCW 46.61.024(1983), whereas here we rely on the "reckless manner" standard that applies under the current version of RCW 46.61.024. *See Malone*, 106 Wn.2d at 611; *Duffy*, 86 Wn. App. at 340; *Mather*, 28 Wn. App. at 703; LAWS OF 2003 ch. 101, § 1. Although the "reckless

manner" standard contemplates a lesser mental state than that of the "willful or wanton" standard, *State v. Ridgley*, 141 Wn. App. 771, 781, 174 P.3d 105 (2007), reacting in a reckless manner is still an unreasonable reaction to an illegal detention.

Sorensen also argues that the evidence must still be suppressed despite his refusal to comply with an unlawful stop order. He contends that as in *State v. Gatewood*, 163 Wn.2d 534, 541, 182 P.3d 426 (2008), he did not respond by assaultive behavior or by endangering life or property, so his response did not provide an independent basis for a constitutional seizure. Sorensen's reliance on *Gatewood* is misplaced. *Gatewood* did not involve an attempt to elude a pursuing police vehicle, it involved contact with a pedestrian. 163 Wn.2d at 537-38. Additionally, *Gatewood* did not involve *any* flight or allegedly reckless behavior; thus, "it was not necessary [for the officers] to take swift measures." 163 Wn.2d at 541. Here, in contrast, Sorensen was in a vehicle and he continued to drive away from the trooper in a reckless manner despite the officer signaling him to stop. Although Sorensen was not driving at an excessive speed, his weaving within his lane, his crossing the center and fog lines, his apparent inability to negotiate a simple turn, and his apparent "impairment" was reckless and justified intervention regardless of the validity of the initial contact. Thus, the trial court did not err in denying Sorensen's motion to suppress.

C. Related SAG Issues

In his SAG, Sorensen further asserts that the trial court erred in denying the suppression motion because it found that he had "attempted to avoid" rather than attempted to elude the trooper. Sorensen also asserts that the trial court failed to consider whether he failed to stop for some reason other than an attempt to elude the trooper.

But, as we discuss above, the focus of the court's analysis was on whether Sorensen's actions when he failed to stop were reckless, not on his reasons for failing to stop. *See Malone*, 106 Wn.2d at 611. Thus, the motive the trial court ascribed to Sorensen was irrelevant to whether the stop was illegal and these arguments fail.

Sorensen also appears to assert that the trial court erred in denying the suppression motion because it improperly relied on Sorensen's behavior immediately before the stop and ignored the fact the initial "seizure" was unlawful. Whether the trooper was justified in attempting to stop Sorensen when the trooper first attempted to initiate the stop became irrelevant once Sorensen engaged in reckless actions. As we note above, regardless of whether the initial attempt to stop Sorensen was illegal, reckless flight is prohibited; it is the nature of the defendant's behavior after the police initiate the stop that is at issue, not whether the trooper had the authority to make the stop in the first instance. *Malone*, 106 Wn.2d at 611; *Duffy*, 86 Wn. App. at 340. Accordingly, this argument also fails.

III. LFOs

Sorensen next argues that the imposition of an LFO requiring him to contribute to the Kitsap County expert witness fund should be stricken because it was not authorized by statute. The State concedes that this cost should be stricken. We accept this concession.

Sorensen further argues that the trial court erred in requiring him to pay for his court-appointed attorney without first considering his present or future ability to pay and that this violates his right to counsel. He admits that Washington courts have not required judicial determination of actual ability to pay before ordering such payment. But citing *Fuller v. Oregon*, 417 U.S. 40,

45, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), Sorensen argues that this construction of RCW 10.01.160(3)[9] violates the right to counsel.[10]

Subject to certain exceptions that do not apply here, we may decline to review any issue not raised below. RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015) ("Each appellate court must make its own decision to accept discretionary review" under RAP 2.5(a)). Arguably, Sorensen's attempt to frame this issue as a constitutional issue is an attempt to argue that this is a manifest constitutional error that we may address despite his failure to object. RAP 2.5(a). But our Supreme Court's requirement of an individualized determination as to the defendant's ability to pay at the time of sentencing was based on the applicable statute, not the constitution.[11] *Blazina*, 182 Wn.2d at 839; *see State v. Blank*, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997). Therefore, we hold that the trial court in this case committed no constitutional error when it required Sorensen to pay fees for his appointed counsel, and Sorensen cannot establish a

[9] RCW 10.01.160(3) provides, "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."

[10] In a footnote, Sorensen also suggests that this approach also raises equal protection concerns because retained counsel must advise a client in advance of fees and costs, while there is no such obligation for appointed counsel. RPC 1.5(b). We do not address this issue because Sorensen fails to present any relevant argument or citation to legal authority. RAP 10.3(a)(6).

[11] Although Sorensen argues that Washington courts have misinterpreted *Fuller*, we are bound by express authority from our Supreme Court. *See State v. Watkins*, 136 Wn. App. 240, 243, 148 P.3d 1112 (2006).

manifest constitutional error. Accordingly, we decline to address this argument under RAP 2.5(a).[12]

We affirm the convictions but remand to the trial court to strike the LFO requiring Sorensen to pay a $100 contribution to the Kitsap County expert witness fund.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Melnick, J.
MELNICK, J.

[12] In a footnote, Sorensen also asserts, "[T]he costs of operating the state crime lab were not 'specially incurred by the state in prosecuting' Mr. Sorensen. RCW 10.01.160(2)." Br. of Appellant at 20 n.9. We do not address this issue because Sorensen fails to present any relevant argument or citation to legal authority. RAP 10.3(a)(6).