

March 21, 2017

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

DARREN CARMEN,

Appellant.

No. 48474-9-II

UNPUBLISHED OPINION

MELNICK, J. — Darren Carmen appeals his conviction for attempting to elude a pursuing police vehicle. Carmen argues there was insufficient evidence to prove he willfully failed to immediately stop his vehicle after having been signaled to do so by an officer. Carmen further argues the trial court erred in allowing the jury to consider ER 404(b) evidence. We affirm Carmen’s conviction.

**FACTS**

Lewis County Sheriff’s Office Deputy Justin Rodgers, a uniformed police officer, sat in his marked police vehicle at an intersection. Rodgers observed a truck go by at a high rate of speed which he estimated to be “around 70, 80 miles an hour.” 1 Report of Proceedings (RP) at 63. Deputy Rodgers made eye contact with Carmen, the driver, as he drove past.

Rodgers saw the vehicle’s brake lights come on, the rear end of the vehicle come up, and the front end come down, which the deputy observed as a sign of the vehicle abruptly stopping after travelling at a high rate of speed. Rodgers pulled out immediately to follow the truck and tried to get a pace of its speed. As soon as Rodgers began to pull out, he saw the truck’s brake

lights go off and the tail end of the truck lower, which indicated the vehicle was accelerating again.

Rodgers observed the truck swerve over the center line. Rodgers activated his overhead emergency lights. The deputy estimated that at that time, he was “between 40, 50 yards” behind Carmen.

Rodgers followed Carmen for approximately a mile and a half with his emergency lights on. Rodgers was able to “close the gap” between the two cars and could see Carmen’s truck’s taillights. 1 RP at 101. The deputy estimated Carmen’s speed at “between 90 and 100 miles an hour.” 1 RP at 67. At one point, Carmen cut a corner while driving through a curve in the road, going into the oncoming lane. The speed limit was 40 miles per hour on that stretch of the road.

Rodgers briefly lost sight of Carmen’s truck, but then came to an intersection where there was a large dust cloud. Rodgers observed the truck in an open field. The deputy determined that the truck left the roadway while trying to make a turn and drove into a gravel parking lot. The truck continued to the bottom of the parking lot where it struck a stump, ran over a speed limit sign, and travelled back onto the roadway where a tire came off the truck. The truck continued into a driveway and then came to a stop in the field.

Upon first approaching the truck, Rodgers observed Carmen “moving very quickly at the driver’s side door.” 1 RP 77. When Carmen started moving quickly away from the vehicle, Rodgers drew his sidearm and commanded Carmen to cease and show his hands. Carmen complied and Rodgers placed Carmen under arrest.

The State charged Carmen with attempting to elude a pursuing police vehicle, driving while license suspended in the third degree, and operating a vehicle without an ignition interlock. Carmen pleaded guilty to the latter two charges and went to trial on the former one.

Before trial, Carmen filed a motion in limine to exclude evidence of the suspended license and ignition interlock convictions under ER 404(b). The trial court granted the motion as to the ignition interlock conviction, finding that its probative value was outweighed by the risk of unfair prejudice. The trial court, however, allowed evidence of the driving while license suspended conviction because “the fact that he pled guilty to the driving suspended in and of itself provides evidence of motive.” 1 RP at 43. The trial court found this evidence’s probative value outweighed any potential prejudice because it showed why Carmen would not stop when Rodgers activated his emergency lights. The trial court instructed the jury that it could only consider Carmen’s driving while license suspended conviction for the limited “purpose of determining whether [Carmen] had any motive to commit the crime of Attempting to Elude” and not for any other purpose. Clerk’s Papers (CP) at 78.

A jury found Carmen guilty of attempting to elude a pursuing police vehicle. Carmen appealed.

## ANALYSIS

### I. SUFFICIENCY OF THE EVIDENCE

Carmen challenges the sufficiency of the evidence supporting his attempting to elude a pursuing police vehicle conviction because the State did not prove that he willfully failed to stop his truck after having been signaled to do so. We disagree.

The due process clause of the Fourteenth Amendment protects a defendant “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Matter of Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Due process further guarantees a defendant the right to challenge the sufficiency of the evidence the State presents at trial. *State v. Tyler*, 195 Wn. App. 385, 392, 382

P.3d 699 (2016). Evidence is sufficient to support a defendant's conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We deem circumstantial and direct evidence equally reliable, and we defer to the trier of fact on issues of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence. *State v. Ozuna*, 184 Wn.2d 238, 248, 359 P.3d 739 (2015); *Thomas*, 150 Wn.2d at 874-75.

A driver is guilty of attempting to elude a pursuing police vehicle when he or she "willfully fails or refuses to immediately bring his or her vehicle to a stop" and "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." RCW 46.61.024(1). Carmen's challenge is limited to proof he willfully failed or refused to immediately bring his vehicle to a stop.

The evidence in our record shows Rodgers observed Carmen drive by him at a high rate of speed. The two made eye contact. Carmen appeared to brake hard and then sped up once Rodgers pulled behind him. Carmen's driver's license was suspended.

Rodgers activated his emergency lights. Rodgers estimated that at that time, he was "between 40, 50 yards" behind Carmen. 1 RP at 66. Rodgers followed Carmen for approximately a mile and a half with his lights on. Rodgers was able to "close the gap" between the vehicles and could see Carmen's truck's taillights while the deputy was behind Carmen's truck. 1 RP at 101. Carmen increased his speed from approximately 70 and 80 miles per hour to between 90 and 100 miles per hour. Ultimately, Carmen lost control while taking a turn and crashed the truck. Carmen

exited the vehicle and appeared to be moving quickly away when Rodgers drew his sidearm and commanded Carmen to stop.

Viewing these facts in the light most favorable to the State, a rational trier of fact could conclude beyond a reasonable doubt that Carmen willfully failed or refused to immediately bring his truck to a stop after being given a visual signal to bring the truck to a stop. While Carmen claims there is no proof he saw Rodgers's emergency lights, the facts viewed in favor of the State show otherwise. Rodgers had on his emergency, flashing lights and was close enough behind Carmen that Rodgers could see Carmen's taillights. We defer to the trier of fact on decisions regarding the persuasiveness of evidence. *Ozuna*, 184 Wn.2d at 248. Here, there was sufficient circumstantial and direct evidence to conclude beyond a reasonable doubt that Carmen willfully failed to stop his truck after Rodgers signaled him to do so. Thus, we hold that there was sufficient evidence to convict Carmen of attempting to elude a pursuing police vehicle.

II. ER 404(B)

Carmen next contends that the trial court erred in admitting evidence of his conviction for driving with license suspended in the third degree. We disagree.

Whether to admit evidence of a defendant's prior "bad acts" under ER 404(b) lies within the trial court's sound discretion. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). A court abuses its discretion when it makes a decision on unreasonable or untenable grounds. *Gunderson*, 181 Wn.2d at 922. Although not generally admissible to show conformity therewith, evidence of prior bad acts may be admissible for other purposes, such as showing motive. ER 404(b).

Before a trial court admits evidence under ER 404(b), it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for admitting the evidence,

(3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect under ER 403.<sup>1</sup> *Gunderson*, 181 Wn.2d at 923. Carmen challenges the trial court's finding regarding the fourth factor.

Carmen argues that the trial court erred in finding that his suspended license conviction was sufficiently probative, because the State was not required to prove motive as an element of attempting to elude a pursuing police vehicle. However, the State did have to prove that Carmen willfully failed to stop when the pursuing deputy signaled him. RCW 46.61.024(1). Evidence that he had a motive to resist contact with police was highly probative of Carmen's willfulness in failing to stop. Evidence of his suspended license allowed the jury reasonably to infer that Carmen was afraid to stop his truck because he believed he would be arrested.

Similarly, in *State v. Potter*, 31 Wn. App. 883, 885-86, 645 P.2d 60 (1982), Potter appealed the trial court's admission of prior reckless driving evidence. The defense theory in *Potter* "was . . . that [the] defendant was not aware he was being pursued by police officers and did not intend . . . to elude them." *Potter*, 31 Wn. App. at 885. The appellate court affirmed the trial court's admission of the prior reckless driving evidence, holding there was no abuse of discretion because "[e]vidence of the similar escapade . . . was admissible to prove . . . the absence of mistake or accident" under ER 404(b). *Potter*, 31 Wn. App. at 885. The court further held that "the trial court 'carefully weighed the relevance of the evidence against its prejudicial impact before allowing its admission.'" *Potter*, 31 Wn. App. at 885.

Here, the trial court properly recognized that the high probative value outweighed the potential for the evidence to unduly prejudice Carmen. The potential prejudice from evidence of

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<sup>1</sup> ER 403 states that evidence, [a]lthough relevant . . . may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

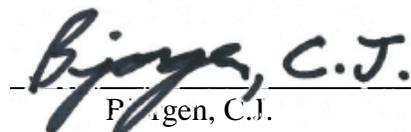
the suspended license conviction lay in the inference that Carmen had a propensity for lawlessness. However, the trial court limited the potency of the inference by instructing the jury that the evidence was only admissible to determine whether Carmen had any motive to commit the crime of attempting to elude. We presume the jury follows the trial court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009). Given all, the trial court's approach of allowing motive evidence while confining any bias from the evidence was not, on these facts, an abuse of discretion.

We affirm.

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.

  
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Melnick, J.

We concur:

  
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Prangen, C.J.

  
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Lee, J.