

64208-1

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NO. 64208-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CELSO GRAMAJO-MARTINEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

BRIEF OF RESPONDENT

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2010 JUN 21 PM 2:58

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

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A. ISSUES PRESENTED

1. When a defendant's criminal acts constitute a continuing course of conduct, a unanimity instruction is not required. In this case, the defendant was charged with attempting to elude a pursuing police vehicle based upon a pursuit that occurred in one location over a very short period of time. Did the trial court properly decline to give a unanimity instruction?

2. The failure to give a unanimity instruction is harmless if there is sufficient evidence to support each act beyond a reasonable doubt. In this case, even if the court determines that there were two separate acts of eluding, there was sufficient evidence to convict beyond a reasonable doubt under each act. Was any error in not providing a unanimity instruction to the jury harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State agrees with the defendant's recitation of the procedural facts for purposes of this appeal.

2. TRIAL TESTIMONY

On December 17, 2008, Seattle was recovering from an earlier snow storm and the weather was extremely cold. 1RP at 23. The roads in North Seattle along Aurora Avenue were covered with patches of black ice and there was snow on the side of the road. 1RP 23-24. At approximately 1:24 in the morning, Officer Sarah Gerlitz was on duty driving a marked patrol car in the area of 175th and Aurora Avenue. She was driving and her partner Officer Billy Muncy was riding in the front passenger seat. 1RP 23. At around 178th and Aurora Avenue, Officer Gerlitz saw a blue pickup truck "fly" by her marked vehicle, make an abrupt lane change and then pull too closely behind a large semi truck. 1RP 27.

At approximately 180th and Aurora, Officer Gerlitz pulled in behind the pickup truck and turned on her vehicle's emergency lights in an effort to pull it over. RP 28. Officer Gerlitz thought that the pickup was going to slow down and stop in response to her lights. 1RP 28. The pickup increased its speed. 1RP 19. Officer Gerlitz responded by activating her siren as well as her emergency lights. 1RP 29. The pickup continued to speed away and she paced it at 53 miles per hour in a 40 mile per hour zone. 1RP

29-30. The vehicle increased its speed to 80 miles per hour in a 40 mile per hour zone.

At approximately 200th and Aurora Avenue, Officer Gerlitz terminated the pursuit because the icy conditions made it to dangerous to continue the pursuit. 1RP 30.

After she terminated the pursuit, Officer Gerlitz slowed her vehicle down to a safe speed and continued to follow the pickup. A few seconds after Officer Gerlitz terminated the pursuit, the pickup made a sharp turn at 205th and Aurora, cut across a park that was on the opposite side of the street, and began to travel the wrong way on East Ballinger Way.¹ Officer Gerlitz saw headlights coming from a vehicle traveling towards the truck on East Ballinger Way. 1RP 31. Fearing that the fleeing truck would cause a head on collision, Officer Gerlitz turned on her lights and sirens and reinitiated the pursuit. 1RP 31. During the pursuit, the defendant drove over the median and lost control of the truck. 1RP 31-32.

Officer Gerlitz described this portion of the pursuit:

It took a right on North 205th, but I was traveling in the --in the right lane of travel, and the vehicle was to my left a little bit in the wrong lane a -- lane of travel. The vehicle then attempted to keep into the proper lane of travel and hit some ice and

¹ East Ballinger Way is also known as 205th Street. 1RP 95.

spun around and ended up flipping up onto a rock that was located on the north side of the street.

1RP 32.

Sergeant Kline was the acting sergeant on duty when this eluding occurred and it was his responsibility to monitor the pursuit.

2RP 59. He listened to the pursuit in real time over the radio dispatch from his office. 2RP 60. He testified that the time between the pursuit being terminated and re-initiated was "[a] very short time later, 15 seconds, maybe..." 2RP 60.

C. ARGUMENT

1. A UNANIMITY INSTRUCTION WAS UNNECESSARY BECAUSE THE EVIDENCE ESTABLISHED A CONTINUING COURSE OF CONDUCT.

The sole issue raised by Gramajo-Martinez on appeal is the court's failure to give a unanimity instruction. Such an instruction is not required when the defendant's acts constitute a continuing course of conduct. Here, Gramajo-Martinez's attempts to elude police occurred in a short period of time and in the same location. Under a commonsense evaluation of the facts, Gramajo-Martinez's attempt to elude the police was a continuing course of conduct, and a unanimity instruction was not required.

A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crime charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When there is evidence that several distinct criminal acts have been committed and the State has not elected the act upon which it relies for conviction, the trial court should provide the jury with a unanimity instruction. 101 Wn.2d at 572.

A unanimity or Petrich instruction is required "only where the State presents evidence of 'several distinct acts.'" State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (quoting Petrich, 101 Wn.2d at 571). However, when the State presents evidence of multiple acts which indicate a "continuing course of conduct," a unanimity instruction is not required. Handran, 113 Wn.2d at 17; State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). The court reviews the facts in a commonsense manner to determine if the criminal conduct constituted one continuing act. Handran, 113 Wn.2d at 17. Factors in this determination include whether the acts occurred at a separate time or in a different place. State v. Marko, 107 Wn. App. 215, 221, 27 P.3d 228 (2001).

When examining whether the defendant's actions constitute a continuing course of conduct, the fact that a temporal break may occur during the criminal acts is not dispositive. For example, in Handran, the defendant entered his ex-wife's house and kissed her in bed. When she demanded that he leave, Handran then hit her. On appeal, he claimed that a unanimity instruction should have been given because two different acts, either the kissing or the hitting, could have constituted the assault element for first-degree burglary. 113 Wn.2d at 17. The Washington Supreme Court rejected this argument:

Handran's alleged criminal conduct occurred in one place during a short period of time between the same aggressor and victim. Under a commonsense evaluation of these facts, the actions evidence a continuing course of conduct to secure sexual relations with his ex-wife, whether she consented or not, rather than several distinct acts.

Id.

Similarly, in State v. Crane, 116 Wn.2d 315, 328-31, 804 P.2d 10 (1991), the court found that the continuing course of conduct exception applied where a victim died of injuries inflicted during a two-hour period. Again, in State v. Craven, 69 Wn. App. 581, 587-89, 849 P.2d 681 (1993), the court held that the

defendant's assaults on a baby over a period of three weeks constituted a continuing course of conduct.

Under a commonsense evaluation of the facts, Gramajo-Martinez's attempt to elude police constituted a continuing course of conduct. The entire incident lasted a very short time and covered a short distance. The first half of the pursuit happened between the 186th block of Aurora and the 200th block of Aurora. The pursuit was only terminated for 5 blocks as the defendant continued to speed down Aurora Avenue. Officer Gerlitz reinitiated the pursuit approximately 15 seconds later when Gramajo-Martinez failed to negotiate a turn and ended up driving against traffic on East Ballinger Way. Gramajo-Martinez's actions demonstrated a continuing effort to elude police and avoid arrest. Because Gramajo-Martinez's actions were part of a continuous course of conduct, a unanimity instruction was not required.

Gramajo-Martinez suggests that the prosecutor's closing argument was inconsistent with the State's position that his actions constituted a continuing course of conduct. In fact, the prosecutor's argument was completely consistent with the notion that Gramajo-Martinez engaged in a continuing course of conduct. The fact that the prosecutor acknowledged there was a brief temporal break is

not inconsistent with the notion that Gramajo-Martinez was engaged in a continuing course of conduct. The prosecutor charged only one count and argued the case as one continuing offense. A unanimity instruction was not required.

2. ANY INSTRUCTIONAL ERROR WAS HARMLESS.

Even if this Court decides that the Petrich instruction should have been given in the present case, it should find that any error in failure to give the instruction was harmless. When the trial court erroneously fails to give a unanimity instruction, the jury verdict will be affirmed only if the error was harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990). The failure to give a unanimity instruction is harmless error if a rational trier of fact could not have a reasonable doubt as to whether the evidence of each incident alleged establishes the commission of the crime. 115 Wn.2d at 65.

Here, no rational trier of fact could have found that Gramajo-Martinez did not commit the crime of attempting to elude during the first or second half of the pursuit. During the first half of the pursuit, the defendant was speeding down at 80 miles per hour on roads covered with patches of black ice. During the second half of the

pursuit, the defendant was speeding the wrong way on East Ballinger Way and heading directly towards another vehicle. In arguing whether the defendant's actions were reckless the prosecutor stated:

I mean if you are going to drive a vehicle at 80 miles an hour down Aurora in the ice, and you're being signaled to pull over, you are driving in a reckless manner. If you pass up a turn and instead of going off to the side of the road you actually come back over the sidewalk into the oncoming traffic with a car coming the other way, you're driving reckless.

2RP 146.

Gramajo-Martinez argues that the Court's failure to give the instruction was not harmless because Gramajo-Martinez could not be found guilty of the eluding enhancement during the first half of the pursuit. He argues that he could not be found guilty under the acts of the first half of the pursuit because his actions failed to threaten one or more persons other than himself or the pursuing officer with bodily harm. This argument is misplaced because it fails to take into account the fact that the defendant had a front seat passenger in the truck during the entire elude. There was overwhelming evidence that the actions of Gramajo-Martinez threatened his front seat passenger with physical harm. The prosecutor made this argument to the jury:

The other thing is there's another passenger in this car. He's also endangering him. Anyone other than him, or the police who are pursuing him. That's Verdict Form A. ___ RP 149.

There was sufficient evidence presented to support eluding under the first or second pursuit and therefore, any error in not providing the jury with a unanimity instruction was harmless.

D. CONCLUSION

For all the foregoing reasons, this Court should affirm Gramajo-Martinez's convictions for eluding.

DATED this 18 day of June, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

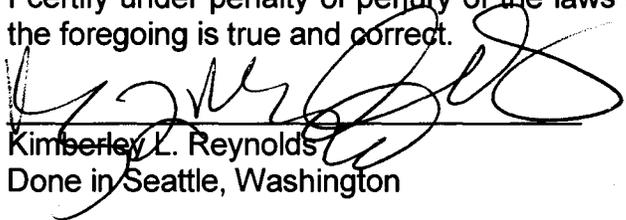


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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kary Dady and David B. Koch, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CELSO GRAMAJO-MARTINEZ, Cause No. 64208-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Kimberley L. Reynolds
Done in Seattle, Washington

6/21/10
Date