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NO. 65466-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

DUANE BATES,

Appellant.

REC'D
OCT 29 2010
King County Prosecutor
Appellate Unit

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COURT OF APPEALS
DIVISION ONE

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

The Honorable Regina S. Cahan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence is insufficient to support appellant's conviction for Attempting to Elude a Pursuing Police Vehicle.

Issue Pertaining to Assignment of Error

To prove the crime of Attempting to Elude a Pursuing Police Vehicle, the prosecution must prove beyond a reasonable doubt that the defendant drove the vehicle in a reckless manner, meaning the defendant drove in a rash or heedless manner, indifferent to the consequences. Where the prosecution failed to prove this element of the offense, is reversal required?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Duane Bates with Possession of a Stolen Vehicle and Attempting to Elude a Pursuing Police Vehicle. CP 1-6.

The charges were based on the events of May 6, 2009. Just after 3:00 p.m., Kent Police Officer Tami Honda was on routine patrol when she noticed a van with a broken front passenger window. RP 152. There were still glass shards in the window frame. Moreover, it was raining steadily and it did not appear that anyone had made an effort to cover the broken window to keep the rain out. The driver of the van, later identified as Duane Bates, would not

make eye contact. RP 152, 167.

Officer Honda pulled in behind the van and ran the license plate through her computer. She learned it had been reported stolen. RP 153. Bates turned north on Central Avenue. RP 153-154, 156. Officer Honda, who was driving a marked police vehicle and wearing her uniform, advised dispatch she was following the van. Other officers indicated they were heading in her direction to assist. RP 154-155.

Officer Honda turned on her overhead lights and “chirped” her siren so that Bates would pull over. RP 156. But Bates continued driving at 35 to 40 miles per hour, the approximate speed limit for Central Avenue, and approached an intersection where a car had stopped for a red light in the curbside lane. RP 157, 173-174, 180. Rather than stop behind that car, Bates switched to the left lane, went around the car, and turned east on 228th Street. RP 157. Although Honda testified traffic was heavy on Central Avenue, there were no cars in the left lane preventing Bates from going around the stopped vehicle. RP 157, 187, 189. She could not recall if there were any cars approaching on 228th when Bates turned on to that street. RP 157-158.

Officer Honda now had her car’s siren on continuously, along

with her overhead lights. RP 159. She continued to follow Bates, who came upon a car stopped at a stop sign on 228th Street. As before, he went around the car and continued through the stop sign without stopping. RP 158. He maintained a speed of about 40 miles per hour, including a short distance where the speed limit changed to 25 miles per hour. At one point, Bates and Honda passed a group of children standing along the side of the road, but the children were on the opposite side of the street. RP 158, 161-162, 172, 180-183.

Bates pulled into an apartment complex located at the end of the road. RP 159. As Bates approached a dead end, he slowed the van, opened the driver's door, got out, and waded into a swampy area. The van came to a stop at a nearby wall. RP 163-164. Rather than follow Bates into the water, Officer Honda alerted other officers to Bates' location. RP 164. Officers convinced Bates to come out of the water, and he was arrested without incident. RP 123-126, 165, 204-206.

Officer Honda had followed the van for about one minute and a total distance of .7 miles, .4 of which she considered a "pursuit," which began when Bates drove around the first car at the stop light on Central Avenue. RP 170-171, 181. She conceded that at no time did the van ever lose control, she did not see any pedestrians

(including children) forced to jump out of the way, and – other than the car stopped at the light and the car stopped at the stop sign – Bates did not go around any vehicles. RP 174-176, 179, 189.

The van had been stolen from a Federal Way apartment complex that morning. RP 92-96. There were bits of broken glass in the interior and the ignition had been “punched,” allowing the van to be started with a screwdriver. RP 95-103. Bates told police he got the van from a friend, but declined to reveal the friend’s identity. RP 224. He denied knowing it was stolen. RP 224-225. He knew there was a police car behind him, but explained that he did not stop because he had an outstanding warrant. RP 225-226.

For the charge of Attempting to Elude, the defense proposed an instruction on the lesser-included offense of Failure to Obey an Officer, which involves the willful failure to stop when signaled by an officer to do so. Unlike Attempting to Elude, Failure to Obey does not involve driving in a reckless manner. RP 237; CP 12-14. The State did not object and the court instructed jurors on this offense. RP 239-242; CP 50-52.

During closing arguments, the prosecutor acknowledged the element of proof at issue for Attempting to Elude was whether jurors could find that Bates drove recklessly while failing to pull over. RP

286-288, 311. He argued that Bates was reckless given the weather, traffic, his decision to go around the stopped cars, his speed, and the children in the area. RP 289-291, 296-297, 307-308. The prosecutor conceded, however, that the State's proof was stronger for Possession of a Stolen Vehicle. RP 291.

Seizing on the prosecutor's admission that the State had less evidence supporting a conviction for Attempting to Elude, defense counsel encouraged jurors to find Bates guilty of Failure to Obey. RP 297, 306. Counsel argued that Bates had not driven recklessly. Rather, he had exercised care while failing to stop, not hitting either stationary vehicle that he drove around, never leaving the roadway, traveling at or near the speed limit, and there was no evidence that he ever interfered with cross-traffic or posed a threat to any pedestrians, including the children he drove by. RP 300-303.

Jurors found Bates guilty of both Possession of a Stolen Vehicle and Attempting to Elude. CP 27-28. The court imposed a standard range sentence, and Bates timely filed his Notice of Appeal. CP 61, 63, 72-81.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUPPORT BATES' CONVICTION FOR ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

RCW 46.61.024 provides:

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. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1) (emphasis added). The only element at issue in

this appeal is highlighted: whether the State proved beyond a reasonable doubt that Bates drove in a reckless manner.

Driving in a reckless manner requires proof that Bates drove “in a rash or heedless manner, indifferent to the consequences.” See State v. Ratliff, 140 Wn. App. 12, 15-17, 164 P.3d 516 (2007); 11A Washington Pattern Jury Instructions, WPIC 90.05, at 255 (West 2008) (citing State v. Roggencamp, 153 Wn.2d 614, 106 P.3d 196 (2005)); see also Comment to WPIC 10.03, at 209 (definition applies to Attempting to Elude). Bates’ jury received this instruction. CP 48.

Where the Legislature has not defined words within a statute, courts look to dictionary definitions. See State v. Leatherman, 100 Wn. App. 318, 323, 997 P.2d 929 (2000). “Rash” means “characterized by or proceeding from lack of deliberation or caution: acting, done, or expressed with undue or disregard for consequences: imprudently involving or incurring risk.” Webster’s New Int’l Dictionary 1883 (1993). “Heedless” means “inattentive, unmindful, careless, unobservant, oblivious.” Id. at 1049.

Even in the light most favorable to the State, it did not prove beyond a reasonable doubt that Bates’ driving was rash, heedless, or indifferent to the consequences.

As an initial matter, that Bates' exceeded the speed limit for a short stretch is insufficient. The prosecutor conceded "the speeds weren't that excessive" in this case. RP 186. According to Officer Honda, Bates exceeded the speed limit "at most" by 15 miles per hour at some point during a two-block stretch. RP 180-181. Travelling between 10 and 20 miles per hour over the posted speed limit is insufficient, by itself, to prove driving in a reckless manner. State v. Randhawa, 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997).

Moreover, as pointed out by defense counsel below, there was no evidence that Bates struck another vehicle, cut off another vehicle, or required a vehicle or pedestrian to take evasive action. Nor did he ever leave the roadway. This is in stark contrast to cases where the evidence has been found sufficient to prove the recklessness element. See Randhawa, 133 Wn.2d at 70, 74-75 (driver reckless where he had been drinking and failed to negotiate a sweeping curve, losing control of vehicle and striking tree); State v. Morales, 154 Wn. App. 26, 31, 51-52, 225 P.3d 311 (driver under influence of alcohol failed to yield right of way to clearly visible car, running stop sign and colliding with car), review granted, 169 Wn.2d 1001 (2010); State v. Ridgley, 141 Wn. App. 771, 774-775, 781-782,

174 P.3d 105 (2007) (driver reached speeds of 80-90 miles per hour, ran a stop sign and turned across traffic, straddled the double yellow line on the highway, drove through a pasture, “tore through two barbed wire fences,” and crashed into a stump); State v. Thompson, 90 Wn. App. 41, 43, 48, 950 P.2d 977 (driver crossed freeway median into oncoming traffic, hitting a vehicle), review denied, 136 Wn.2d 1002 (1998); State v. Hill, 48 Wn. App. 344, 347-348, 739 P.2d 707 (driver intoxicated, drove wrong way on freeway, and failed to attempt avoidance of oncoming traffic), review denied, 109 Wn.2d 1018 (1987).

Bates did go around two vehicles stopped at traffic signals. But there was no evidence of any moving vehicles at these intersections at the time. Nor was there evidence that anyone was near the van when Bates eventually jumped out. While Bates clearly refused to stop for Officer Honda, his continued driving was not rash, heedless, or indifferent to the consequences. In fact, it displayed some degree of attention, care, and concern for the consequences. At most, Bates was guilty of Failure to Obey.

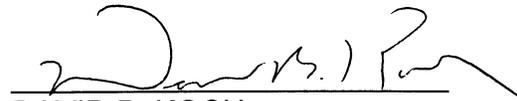
D. CONCLUSION

This Court should reverse and vacate Bates' conviction for Attempting to Elude a Pursuing Police Vehicle. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (insufficient evidence requires dismissal with prejudice).

DATED this 29th day of October, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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

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| STATE OF WASHINGTON, |) | |
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| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF OCTOBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DUANE BATES
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1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF OCTOBER, 2010.

x *Patrick Mayovsky*