

67443-9

67443-9

NO. 67443-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JORDON,

Appellant.

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

The Honorable Bruce I. Weiss, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct during closing argument denied appellant a fair trial.

2. The trial court erred in failing to enter written Findings of Fact and Conclusions of Law pursuant to CrR 3.5(c).

Issues Pertaining to Assignments of Error

1. Appellant was charged with attempting to elude a pursuing police vehicle. Trial was a credibility contest. During closing argument, the prosecutor told jurors one critical eyewitness “was a credible witness.” Defense counsel’s timely objection was overruled. Did the prosecutor commit reversible misconduct by expressing his personal opinion as to the credibility of the witness?

2. Following a hearing to determine the admissibility of statements by the appellant, the trial court failed to enter written findings of fact or conclusions of law as required by CrR 3.5. Must this Court remand for entry of written findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural History

Appellant Michael Jordon was charged in Snohomish County with one count of attempting to elude a pursuing police vehicle. CP 61-62. Following a pretrial hearing, Jordon's custodial statements were held admissible. 1RP 69-73.<sup>1</sup> No written findings of fact and conclusions were entered.

A jury found Jordon guilty. CP 40. The trial court sentenced him to 30 days confinement and converted it to 240 hours of community service. CP 20-30; 4RP 11. Jordon appeals. CP 1-14.

2. Trial Testimony

On August 12, 2009 Jordon left his girlfriend's house and drove his motorcycle onto the freeway. 3RP 43, 59. On the way home, he passed a Crown Victoria car parked on the shoulder at 75 miles-per-hour. 2RP 17-18, 32; 3RP 48.

The Crown Victoria was a "non-standard" Washington State Patrol car without external lights or outside decals. 2RP 56. The car's internal

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – March 31 and April 7, 2011; 2RP – April 25, 2011; 3RP – April 26, 2011; 4RP – June 7, 2011.

emergency lights were not on. 2RP 29-31, 55. Jordon did not realize it was a police car. 3RP 48.

Trooper Chris Caiola was standing three feet from the trunk of his car watching traffic. 1RP 37, 47; 2RP 28, 31, 55. He wore a department issued black uniform without a “campaign hat.” 2RP 29, 56. Caiola made eye contact with Jordon from about 300 feet away and used his left hand to order Jordan to pull over. 2RP 32-33, 57-58. Jordon made a “head bob,” which Caiola took to mean “he understood what I wanted him to do.” 2RP 33, 58. Caiola heard the motorcycle decelerate but its driver did not pull over. 2RP 33. When Caiola “heard the motorcycle rev” he entered his “already running” car. 2RP 33, 60-61.

Caiola turned on the car’s emergency lights but not its siren. 2RP 34. Driving at 90 miles-per-hour, Caiola narrowed the gap between him and the motorcycle. 2RP 64-65, 73-74. The motorcycle driver did not tailgate or cut other drivers off. It made no unsafe lane changes and ran no red lights or stop signs. 2RP 68-69. Caiola admitted driving at 75 miles-per-hour is not necessarily reckless driving. 2RP 46.

Caiola chased the motorcycle for seven-tenths of a mile until it exited. 2RP 36, 41. Caiola did not call other officers because it was his “shortest elude in history.” 2RP 65, 86-87.

Caiola saw a dust cloud and the motorcycle pass cars on the exit shoulder before losing sight of it for several seconds. 2RP 36-37. Caiola could not determine the motorcycle's speed during the exit. 2RP 76-77. Caiola did not see the motorcycle hit the "jersey barrier." 2RP 44.

Caiola next saw the motorcycle on the ground near a car. Jordon was walking away from the motorcycle. 2RP 37, 43, 76. Caiola ordered Jordon to the ground at gunpoint. Jordon complied and was handcuffed. Caiola called for an ambulance and read Jordon his Miranda<sup>2</sup> rights. 2RP 37-39. Jordon told Caiola he did not stop because he could not afford the ticket. 2RP 40. Jordon was taken to a hospital by ambulance. He was not hurt. 2RP 79; 3RP 24, 56.

The car driver, Susan Forys, was waiting to turn when a speeding motorcycle hit her car. 2RP 92-94. Forys saw the motorcycle driver try to lift the bike before sitting on the curb. 2RP 93-94. Both the motorcycle and the car had dents and scuffs. 2RP 103. Forys was able to drive her car home. 2RP 96.

Troopers Anson Statema and Deion Glover arrived after the accident. 2RP 97, 109; 3RP 23, 26. Statema saw a fresh skid mark leading from the accident toward the "jersey barrier." 2RP 100, 108. The

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

mark was not measured. 2RP 117-18. Jordon told Glover and Statema he panicked and made a bad decision. 2RP 99; 3RP 24-25.

Trooper Gavin Cohrs arrived after the accident and completed a field diagram. 3RP 28, 30-31. The diagram was not drawn to scale and did not include measurements. 3RP 31. Cohrs opined the motorcycle skidded after braking and hit the “jersey barrier” before bouncing into the car. 3RP 32. Cohrs did not talk to Forys or Jordon. 3RP 34.

Caiola took no pictures of the motorcycle, car, or accident scene. 2RP 78, 83-84. He looked at video recorded by a traffic camera but did not save it. 2RP 53-54. The video was not shown at trial. 3RP 66.

Jordon denied making eye contact or nodding toward Caiola. 3RP 48-49. He did not see flashing lights and did not know Caiola was chasing him. 3RP 50, 54, 57, 69-70. Jordon left the freeway because his gas tank light was on. 3RP 44-45, 60. He was not sure whether he told troopers the motorcycle was low on gas. 3RP 68-69. Jordon was driving nearly 60 miles an hour and probably drove on the shoulder as he got off the freeway. 3RP 50-51, 53, 63. He had slowed to about 10 miles-per-hour when his back tire skidded against debris and hit a car. 3RP 51-53. Jordon denied driving away from Caiola or making comments to troopers. 3RP 54-56.

3. Closing Argument

According to the prosecutor, “the second main issue that you have to decide is was the Defendant’s driving what they define driving in a ‘reckless manner.’” 3RP 72.<sup>3</sup> “Reckless manner” was defined as “to drive in a rash or heedless manner, indifferent to the consequences.” CP 51 (Instruction 8).

The prosecutor contended the “reckless manner” element had been proven by Forys’ “credible” testimony:

He somehow lost control of his bike because he was going at an unsafe speed for that shoulder and ricocheted his bike,

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<sup>3</sup> The to convict instruction provided that each of the following elements had to be proven beyond a reasonable doubt:

- (1) That on or about the 12<sup>th</sup> day of August 2009, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
- (3) That the signaling police officer’s vehicle was equipped with lights and siren;
- (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and
- (6) That the acts occurred in the State of Washington.

CP 50 (Instruction 7).

landing in front of a red Accra [sic] and doing damage to the Accra [sic]. We know it happened that way because we have testimony from Susan Forys who came in and testified as to exactly what she saw. She was a credible witness.

3RP 80-81.

Defense counsel immediately objected to the prosecutor's characterization of Forys as a "credible witness." The trial court overruled the objection without further comment. 3RP 81.

Defense counsel argued the case was about "perspective." 3RP 84-85. Counsel noted that "nothing happened on that highway that was reckless. You've heard absolutely no evidence of that. Going 75 is not necessarily reckless." 3RP 89. Turning to Jordon's driving just before the crash, defense counsel noted:

Well, obviously there was an accident on the off ramp, but an accident doesn't necessarily mean that that was rash and heedless of the consequences, heedless manner or indifferent to the consequences. Accidents happen....What you don't know is what the speed was when that happened, what caused it, why he couldn't get it back up. You might say: well, it's possible he was driving recklessly. It's possible that driving on the shoulder with debris might be reckless. It's possible that was rash or heedless of the consequences. But you don't have anything to back that up. Possible is not enough.

3RP 89-90.

C. ARGUMENT

1. THE PROSECUTOR'S OPINION THAT FORYS WAS A "CREDIBLE WITNESS" VIOLATED JORDON'S RIGHT TO A FAIR TRIAL.

a. The Prosecutor Committed Misconduct.

To maintain impartiality, a prosecutor may not express a personal opinion as to the veracity of a witness or the guilt or innocence of the accused. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prejudicial error occurs when it is clear the prosecutor is expressing a personal view rather than arguing an inference from the evidence. State v. McKenzie, 157 Wn.2d 44, 54, 134 Wn.2d 221 (2006); State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, rev. denied, 100 Wn.2d 1003 (1983).

This is what happened at Jordon's trial. The prosecutor plainly expressed his personal opinion that Forys was credible. The opinion of a government official carries extra weight and may unduly influence the jury. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004), rev. denied, 154 Wn.2d 1009 (2005). The prosecutor's impermissible vouching was particularly damaging because it had the prestige of a governmental official behind it.

b. The Misconduct Requires Reversal.

A prosecutor commits reversible error where the defendant establishes the comments were improper and there was a substantial likelihood the remarks impacted the jury. State v. Rivers, 96 Wn. App. 672, 675, 981 P.2d 16 (1999). Jordan meets his burden here.

Forys' testimony was crucial to the State's "main issue" of proving Jordan drove in a reckless manner on the off ramp. Caiola admitted Jordan did not tailgate or cut other drivers off while on the freeway. He made no unsafe lane changes and disobeyed no red lights or stop signs. 2RP 68-69. The only evidence of recklessness while on the freeway was Jordan's 75-mile per-hour speed. Excessive speed alone, however, does not constitute driving in a reckless manner. State v. Farr-Lenzini, 93 Wn. App. 453, 469-70, 970 P.2d 313 (1999). See also State v. Randhawa, 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997) (concluding that traveling between 10 and 20 m.p.h. over the posted speed limit is not alone sufficient to support an inference of reckless driving). Caiola admitted as much. 2RP 46.

Thus, the State was required to prove Jordan drove in a reckless manner while exiting the freeway. Caiola temporarily lost sight of the motorcycle before the accident. No video of the accident was admitted at

trial. No evidence conclusively established what Jordon's speed was as he exited the freeway.

Jordon said he exited the freeway at 60 miles-per-hour., but slowed to 10 miles-per-hour immediately before the crash. Forsy's was the only neutral witness who testified to events immediately preceding Jordon's crash. Moreover, Forsy's testimony that Jordon tried to pick the motorcycle up allowed jurors to reasonably infer he sought to flee. Evidence of flight is admissible to show consciousness of guilt. State v. Herbert, 33 Wn. App. 512, 515, 656 P.2d 1106 (1982). By vouching for Forsy's credibility, the prosecutor placed the integrity of his office on the side of his witness, and in turn on the main question the jury had to decide. This was misconduct.

The trial court exacerbated the prosecutor's misconduct by overruling defense counsel's timely objection. This "official imprimatur . . . placed upon the prosecutor's misstatements . . . obviously amplified their potential prejudicial effect on the jury." Mahorney v. Wallman, 917 F.2d 469, 473, (10<sup>th</sup> Cir. 1990) (finding prejudice where trial court overruled defense counsel's objections and failed to admonish prosecutor). For these reasons, this Court should reverse Jordon's conviction.

2. REMAND IS REQUIRED FOR ENTRY OF WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 3.5(c).

The trial court must enter written findings of facts and conclusions of law after a hearing to determine the admissibility of a defendant's statements. CrR 3.5(c).<sup>4</sup> Written findings and conclusions are mandatory. State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1 (d), which requires entry of written findings of fact and conclusions of law after bench trial).

Here, the trial court held a hearing to determine whether to admit Jordan's statements to police. The court concluded they were admissible, but failed to enter the required written findings and conclusions.

The purpose of written findings and conclusions is to promote efficient and precise appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see State v. Head, 136 Wn.2d 619, 622, 964

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<sup>4</sup> CrR 3.5(c) provides:

(c) Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

P.2d 1187 (1998) (written findings necessary to simplify and expedite appellate review). The absence of written findings and conclusions prohibits effective appellate review.

Although the trial court entered oral findings,<sup>5</sup> such are not a suitable substitute for written ones; a court's oral opinion is not a finding of fact. State v. Hescoek, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a court's oral opinion is merely an expression of the court's informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated into the written findings, conclusions and judgment. Head, 136 Wn.2d at 622 (citing State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)).

A trial court's failure to enter written findings and conclusions requires remand for entry of them. Head, 136 Wn.2d at 624. Here, because the trial court failed to enter written findings and conclusions, remand is the appropriate remedy.

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<sup>5</sup> 1RP 69-73.

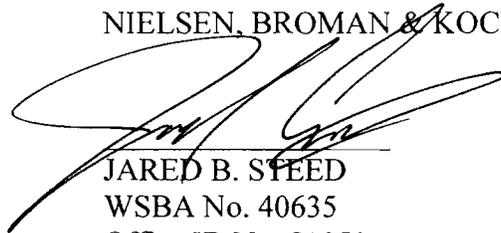
D. CONCLUSION

For the reasons discussed above, this Court should reverse Jordon's conviction and remand for a new trial.

DATED this 28<sup>th</sup> day of December, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is stylized and cursive.

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