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Court of Appeals
Division I
State of Washington

NO. 73323-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DONNIE GREER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUE

A defendant is entitled to an instruction on a lesser included offense when the lesser offense consists solely of the elements of the greater charged offense, and the evidence supports an inference that *only* the lesser crime was committed. The defendant was charged with attempting to elude a pursuing police vehicle. The trial court found that there was not a factual basis for a lesser included instruction on February 24, 2015. Did the trial court abuse its discretion?

B. STATEMENT OF CASE

1. PROCEDURAL HISTORY

The State charged Donnie Greer with one count of attempting to elude a pursuing police vehicle. At trial, a jury found Greer guilty of attempting to elude a pursuing police vehicle. Greer was sentenced to the low end of the standard range of four months with Electronic Home Detention approved as a sentence. The sentence was ordered to run concurrent to the King County cause number 14-1-00978-6.

2. SUBSTANTIVE FACTS

On August 22, 2013, at about 4:30 P.M., King County Sheriff's Detective Aaron Thompson and Deputy Chris Przygocki were working as plain clothes officers in the White Center neighborhood of Burien. 3RP 7-10. Thompson was driving an unmarked grey Dodge Caravan minivan with Przygocki as the passenger. 3RP 10, 98. The van was equipped with lights and sirens but did not contain any markings or equipment that would identify it as a police vehicle. 3RP 10. Thompson and Przygocki were working in plain clothes and driving the "unmarked" minivan in order to avoid detection and work undercover. 3RP 7, 74.

Thompson and Przygocki were parked in a grocery store parking lot when they first observed the defendant in a maroon sedan. 3RP 18-19. Based on their observations of the defendant, they made the decision to conduct an investigatory stop. 3RP 18-19. Based on a defense pre-trial motion, the basis for the stop was not admitted at trial. 1RP 12-21. The defendant began driving to exit the parking lot and Thompson and Przygocki followed. 3RP 19. Thompson and Przygocki put on their department issued "throw-over" vests. 3RP 19. Thompson's vest had yellow "Sheriff" lettering on the front and back. 3RP 14-16, 76. Przygocki's vest

said "Police" in white lettering on the front and back. 3RP 75-76, 101-03. The officers were directed by their sergeant to wear the vests, when working on a plain clothes patrol, prior to making any civilian contact so that they can be identified as police officers.

3RP 22. While still in the parking lot, Thompson put a jacket on to cover the "Sheriff" lettering on the vest because he was not ready to be identified as police yet. 3RP 19.

As Thompson exited the parking lot, he removed his jacket and the "Sheriff" decal on his vest was no longer covered up. 3RP 20. Thompson pulled out of the parking lot onto northbound 15th Avenue Southwest to follow the defendant's car and activated his emergency lights. 3RP 20, 23. The defendant then pulled over to the side of the road on 15th Avenue Southwest, and Thompson and Przygocki pulled in behind him. 3RP 27. Przygocki exited the passenger side of the van and began approaching the defendant's car. 3RP 28, 105. The defendant looked out the rear windshield of his car in the direction of Przygocki. 3RP 28, 105. At this point, Przygocki recognized the defendant. 3RP 106. Przygocki later realized, after seeing his face up close and running the defendant's name through a police database after the incident, that he had previous contact with him in February 2013, or about six months

prior. 3RP 119. The defendant turned back around facing forward in his car and fled the traffic stop. 3RP 31, 106.

The defendant testified that as he was leaving the grocery store parking lot he saw flashing lights and pulled over in response. 3RP 170. At the traffic stop, the defendant saw a "regular person" running toward his car with a gun being held with both hands. 3RP 171. The defendant stated he did not believe this person was a real police officer and was scared for his life. 3RP 171-72. As a result, the defendant decided to drive to a park-and-ride on Meyers Way where a retirement home was located. 3RP 172-74. The defendant stated he felt safer there because he knew there were cameras at this facility. 3RP 172-74. The defendant stated he knew "exactly" how to get to the retirement home because he had dropped off his grandmother's friend there previously. 3RP 172-74. Despite his fear for his life, instead of driving directly to the retirement home from the traffic stop by going straight on 102nd Avenue Southwest toward Meyers Way, the defendant drove in a multi-mile loop around White Center and ultimately ended up at the retirement home. 3RP 176; Ex. 1.

After fleeing the traffic stop, the defendant first traveled north on 15th Avenue Southwest at about 30-35 miles per hour. 3RP 32.

The speed limit on 15th Avenue is 25 miles per hour. 3RP 32. Traffic was relatively light on 15th Avenue Southwest. 3RP 32. The defendant approached the four-way-stop intersection of 15th Avenue Southwest and 102nd Street where other cars were observed. 3RP 33. The defendant failed to stop at the stop sign at 15th Avenue Southwest and 102nd Street and turned east on 102nd Street. 3RP 33. Traffic was relatively light on 102nd Street. 3RP 34. The speed limit on 102nd Street is 25 miles per hour. 3RP 36. The defendant drove between 35-40 miles per hour on 102nd Street. 3RP 37. Traffic in both eastbound and westbound lanes of travel on 102nd Street was yielding to the lights and sirens in Thompson's car. 3RP 37. Both the defendant and Thompson were passing cars that had pulled over and yielded to Thompson's car. 3RP 37. At 102nd Street and 4th Avenue Southwest, instead of continuing east toward the park-and-ride and retirement home off Meyers Way, the defendant failed to yield for a stop sign and turned south on 4th Avenue Southwest. 3RP 38. Cars were stopped in all directions at the 102nd Street and 4th Avenue Southwest intersection. 3RP 41. The defendant drove into an oncoming lane of travel to drive around stopped cars and turned south on 4th Avenue Southwest.

King County Sheriff's Deputy James Price was in uniform in a marked patrol car in the area of 108th Street and 4th Avenue Southwest when the pursuit was called out over the radio by Thompson. 3RP 142-45. King County Sheriff's policies require marked cars to be the lead car in a pursuit when possible. 3RP 142. Price positioned his vehicle in the middle of the intersection facing east on 108th Street in order to have the defendant's car stop. 3RP 145-46. The emergency lights on Price's marked patrol car were activated as he waited at this intersection. 3RP 145. The driver's side of Price's patrol car faced north, the direction the defendant and Thompson were driving from. 3RP 145. On the driver's side of his patrol car, there was a large logo marking "Sheriff" with the King County Sheriff's Office badge included. 3RP 143. As the defendant's car was traveling south on 4th Avenue Southwest toward Price's car, there was nothing obscuring the view from the defendant's windshield to Price's patrol car. 3RP 147. The defendant failed to yield to Price's marked patrol car and lights at the intersection of 4th Avenue South and 108th Street. 3RP 147. The defendant turned west onto 108th Street, with the driver's side of his car coming within five to seven feet of Price's patrol car in doing so. 3RP 148. Price made a

U-turn and joined the pursuit with Thompson as the lead car westbound on 108th Street. 3RP 148.

On 108th Street, both westbound and eastbound cars yielded to the emergency lights on Thompson's and Price's cars. 3RP 45. The speed limit on 108th Street is 25 miles per hour. 3RP 47. Thompson estimated the defendant's speed on 108th Street at about 50 miles per hour, or twice the speed limit, with other traffic yielding. 3RP 47. Along 108th Street are pedestrian sidewalks and residential and commercial buildings. 3RP 47. The defendant turned north on 12th Avenue Southwest from 108th Street. 3RP 48. There is no requirement to stop at this intersection, and the defendant did not stop at this intersection. 3RP 48. The defendant traveled a short distance on 12th Avenue Southwest and turned east on 106th Street, and then north on 8th Avenue Southwest. 3RP 48. Traffic was light on 8th Avenue Southwest. 3RP 48.

The defendant approached the intersection at 102nd Street and 8th Avenue Southwest a second time, this time from the south on 8th Avenue Southwest. 3RP 48. Other cars were pulled over to the side of the road at this four-way stop. 3RP 48. The defendant continued through the intersection past yielding traffic without stopping and turned east on 102nd Street. 3RP 48-50. To pass

through the intersection, the defendant drove into oncoming lanes of travel. 3RP 48-50. On 102nd Street, the defendant reached speeds of about 50-60 miles per hour in a 25 mile per hour zone. 3RP 50. Traveling east, the defendant approached the intersection of 102nd Street and 4th Avenue Southwest for a second time. 3RP 50. 102nd Street and 4th Avenue Southwest is typically a busy intersection. 3RP 51. Both times through this four-way intersection during the pursuit cars were waiting in each direction. 3RP 51. The defendant failed to stop at this intersection and drove into the oncoming lane of travel to pass other vehicles. 3RP 50.

As the pursuit reached 102nd Street and 1st Avenue Southwest, Price was able to catch up and become the lead vehicle of the pursuit. 3RP 51, 153. The defendant continued east on 102nd Street without stopping for a stop sign at 1st Avenue Southwest. 3RP 52. At this point in the pursuit Price was able to close the gap between his car and the defendant's car to about five car lengths. 3RP 153. 102nd Street then travels downhill and takes an "S" curve before connecting to Meyers Way. 3RP 154. The defendant failed to stop at a stop sign at the bottom of the hill on 102nd Street and turned north on Meyers Way. 3RP 154. There were other cars at this intersection but they were stopped.

3RP 154. On Meyers Way, Price had to travel 80 miles per hour to catch up to the defendant. 3RP 156. Once he caught up, Price estimated that both cars were traveling at about 65 miles per hour. 3RP 156. Thompson, the trail car at this point, estimated that speeds were about 50 miles per hour. 3RP 53. The speed limit on arterials like Meyers Way is 40 miles per hour. 3RP 156.

As the defendant approached the park-and-ride and retirement home off Meyers Way, he drove into the oncoming lane of travel toward the entryway of the park-and-ride. 3RP 165. At this entryway Price observed about seven elderly people, one of whom was attempting to cross the crosswalk. 3RP 158-59. One elderly woman appeared startled by the defendant's turn into the entryway at a high rate of speed and had to quickly scurry back to the sidewalk to avoid being hit by the defendant's car. 3RP 159. The pursuit came to an end within the parking lot of the park-and-ride. 3RP 160.

At no time during the pursuit when Price was involved was the defendant's car out of Price's view. 3RP 162. The defendant testified that he did not observe Price behind him until he was about to pull into the park-and-ride off Meyers Way. 3RP 172. According to Thompson, the entire pursuit was 3.9 miles, and speeds seemed

high compared to other pursuits he had been involved in.

3RP 78-80, Ex. 1.

C. ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A LESSER INCLUDED INSTRUCTION.

The defendant contends that the trial court abused its discretion in finding that there was not a factual basis for a lesser included instruction on February 24, 2015, under the factual prong of the Workman test. This claim should be rejected. The evidence presented at trial does not support an inference that *only* the crime of failure to obey was committed, to the exclusion of the greater charged offense.

A party at trial may request a jury instruction for a lesser included offense to the greater charged offense. RCW 10.61.006. A criminal defendant is not entitled to an instruction on a lesser included offense merely because he makes such a request. State v. Snider, 70 Wn.2d 326, 422 P.2d 816 (1967). To justify such an instruction there must be some basis in the evidence produced at trial positively inferring that the lesser crime was committed and upon which the jury could make a finding as to the lesser included

offense. Id. The Washington Supreme Court established a two-prong test to determine whether the requesting party is entitled to an instruction on the lesser included offense: (1) whether each of the elements of the lesser offense is a necessary element of the greater charged offense (legal prong), *and* (2) whether the evidence in the case supports an inference that the lesser crime was committed (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The requesting party is entitled to an instruction on the lesser included offense when both prongs are met. Id. The factual prong requires that there be facts that raise an inference that *only* the lesser included offense was committed to the *exclusion* of the greater charged offense. State v. Condon, 182 Wn.2d 307, 322-24, 343 P.3d 357 (2015) (citing State v. Berlin, 133 Wn.2d 541, 551, 947 P.2d 700 (1997)). There is no requirement that a lesser included instruction be given *solely* because the jury might simply disbelieve the State's evidence. State v. Rodriguez, 48 Wn. App. 815, 820, 740 P.2d 904 (1987).

At trial, the State conceded, and the court agreed, that the legal prong of the Workman test was met. 2RP 168-70; 3RP 183. When applying Workman's factual prong, a court must view the supporting evidence in the light most favorable to the party

requesting the lesser included offense instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The factual prong is satisfied when evidence would permit the jury to rationally find the accused guilty of the lesser offense and acquit him of the greater. Id. In making this determination, the court must consider all the evidence presented at trial by either party. Id.

A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). The reviewing court will find an abuse of discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

A person is guilty of attempting to elude a pursuing police vehicle when he (1) willfully fails or refuses to immediately bring his car to a stop, and (2) drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle after (3) being given a visual or audible signal by a uniformed police officer in a vehicle

equipped with lights and sirens to bring the vehicle to a stop.

RCW 46.61.024(1). A person is guilty of failure to obey when he

(1) willfully fails to stop when requested or signaled to do so by

(2) a person reasonably identifiable as a law enforcement officer.

RCW 46.61.022.

The difference between attempting to elude and failure to obey is the driving in a reckless manner element. A person

commits the crime of reckless driving when he drives a vehicle in willful or wanton disregard for the safety of persons or property.

RCW 46.61.500; WPIC 95.01. Willful means acting intentionally and purposely, and not accidentally or inadvertently. WPIC 95.10.

Wanton means acting intentionally in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, harm a person or property. Id.

Here, for the trial court to have granted the defendant's motion on the lesser included instruction, the court would have had to make a finding that, after viewing the evidence in the light most favorable to the defendant, the jury could have rationally found that the defendant's driving that occurred while attempting to elude a

pursuing police vehicle was not reckless. The trial court made a finding that there was no factual basis for the lesser included instruction. The trial court was not unreasonable in making this finding.

At trial, the State presented evidence of the defendant's driving through the testimony of Detective Thompson, Deputy Przygocki, and Deputy Price. There was no dash cam video or other evidence presented showing the defendant's driving. The defendant did not provide any testimony rebutting or challenging the observations of his driving as testified to by Thompson, Przygocki, and Price. Rather, the defendant's testimony emphasized that he did not believe he was being pursued by "real" cops. 3RP 170-77. Specifically, the defendant testified that he did not observe Price behind him until he was about to pull into the park-and-ride off Meyers Way. 3RP 172. This is in contrast to Price's testimony that the defendant drove through the intersection at 4th Avenue Southwest and 108th Street where Deputy Price was waiting with emergency lights activated and came within 5-7 feet of his fully marked patrol car. 3RP 147. This is also in contrast to Price's testimony that he was five car lengths behind the defendant and was the lead pursuit car at 102nd Street and 1st Avenue

Southwest, prior to the "S" curve downhill stretch leading to Meyers Way. 3RP 51, 153.

According to the defendant he fled the initial traffic stop because he was scared for his life. 3RP 171-72. As a result, the defendant decided to drive to a park-and-ride on Meyers Way where a retirement home was located. 3RP 172-74. The defendant stated he felt safer there because he knew there were cameras at this facility. 3RP 172-74. The defendant stated he knew "exactly" how to get to the retirement home because he had dropped off his grandmother's friend there previously. 3RP 172-74. Despite his alleged fear for his life, when the defendant had the opportunity to continue east on 102nd Street toward the retirement home he instead chose to turn south on 4th Avenue Southwest and drive in a loop. 3RP 176; Ex. 1. Furthermore, despite the defendant's alleged fear for his life, when he had the opportunity to contact a "real" cop in Deputy Price at 4th Avenue Southwest and 108th Street to report that he believed armed fake cops were after him, the defendant drove through the intersection within five to seven feet of Price's fully marked patrol car. 3RP 147.

In making its ruling to not give the lesser included instruction, the trial court noted that:

the only evidence we have in this case about the incident is the description of the defendant going up to twice the speed limit. Sixty-five miles per hour. Going through stop signs without stopping. Going into the wrong lane of traffic to pass cars that were stopped. Pulling into an area where there was a pedestrian who had to walk – I don't remember – walk is probably not the right word, but go quickly out of it because he went into that area. There is no – I don't believe there is a factual basis for the defendant's lesser. I'm not going to be giving it.

3RP 183.

Defense argued in closing that the defendant should be believed that he did not knowingly fail to immediately stop for a uniformed police officer in a marked car because he did not believe Thompson and Przygocki were real officers and he did not observe Price until the very end of the pursuit. 4RP 29-30. Counsel further argued that once the defendant realized Price was behind him he immediately pulled over and did not drive recklessly. 4RP 31-32.

As the trial court noted, there is no requirement that a lesser included instruction be given *solely* because the jury might simply disbelieve the State's evidence. Rodriguez, 48 Wn. App. at 820. Regardless, even if the trial court had viewed the defendant's testimony as credible and ignored the State's evidence, which is not the proper standard for viewing the evidence in the light most favorable to the moving party, the trial court noted that the

defendant nearly struck a pedestrian after he claimed he first saw a uniformed officer pursuing him. The court noted that this fact was one of the facts it considered in the light most favorable to the defendant in concluding that no rational trier of fact could find that the defendant's driving was not reckless. The trial court was correct in making this factual finding, and did not abuse its discretion.

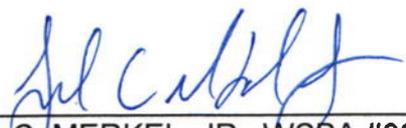
D. CONCLUSION

The trial court properly exercised its discretion in denying the defendant's motion for a lesser included instruction. This Court should affirm Greer's conviction.

DATED this 4 day of April, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mary T. Swift, the attorney for the appellant, at swiftm@nwattorney.net, containing a copy of the containing a copy of the BRIEF OF THE RESPONDANT, in State v. Donnie Jamaal Greer, Cause No. 73323-1, 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.

Dated this 4th day of April, 2016.

Janice Schwarz
Name:

Done in Kent, Washington

Janice Schwarz