

74559-0

FILED
August 26, 2016
Court of Appeals
Division I
State of Washington

74559-0

NO. 74559-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DESTRY SCHNEBLY,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

To impose a sentencing enhancement for attempting to elude a police officer, the State must prove beyond a reasonable doubt Destry Schnebly *endangered* one or more persons other than himself or the pursuing law enforcement officer.

The jury was unable to answer this question because the special verdict form they were given erroneously stated the State only needed to prove Mr. Schnebly's actions *threatened physical harm or injury* to persons other than himself or others.

The failure to properly instruct the jury on this essential element relieved the State of its burden of proving every element of the crime charged beyond a reasonable doubt. This constitutional error requires reversal.

B. ASSIGNMENT OF ERROR

The State was relieved of its burden of proving every element of the crime charged when the jury was improperly charged on whether Mr. Schnebly endangered any person other than himself or the pursuing officer when he committed an attempt to elude police vehicle.

C. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

When the State is able to prove beyond a reasonable doubt that the accused committed the crime of attempting to elude a police vehicle while endangering persons other than himself and the pursuing officer, the court must impose a sentencing enhancement of one year and a day. The State may file a special allegation where there is sufficient admissible evidence to show persons, other than the accused and the pursuing officer, were threatened with physical injury or harm.

Is reversal required where the instructions to the jury and the special verdict form failed to properly define endangerment, instead directing the jury to find threat of physical injury or harm instead of endangerment?

D. STATEMENT OF THE CASE

1. *Mr. Schnebly committed the crime of eluding a police vehicle but did not endanger persons other than himself or the pursuing officer.*

Mr. Schnebly did not contest circumstances which led to his arrest for attempting to elude a police vehicle and his lawyer agreed at trial he had committed the offense. RP 101. Mr. Schnebly only challenged whether he had endangered anyone other than himself and the pursuing officer when he committed the crime. RP 101.

Mr. Schnebly was parked at a McDonald's near the Tulalip Indian Reservation Casino when Dep. Bryson McGee first saw him. RP 32. After the officer drove past Mr. Schnebly, Mr. Schnebly's friend jumped into the front seat of the car. RP 33. Mr. Schnebly left the lot. There were two passengers in the car. RP 43.

Dep. McGee followed Mr. Schnebly and attempted to make a traffic stop. RP 34-35. Mr. Schnebly did not stop, instead accelerating away from the officer. RP 37. Before he entered the highway, Dep. McGee estimated he was driving between 50 and 60 miles an hour. RP 38. There was no traffic on the farming roads Mr. Schnebly was driving on before he entered the highway. RP 62. The officer followed Mr.

Schnebly onto I-5, where Mr. Schnebly's speed varied from 40 to 100 miles an hour. RP 39.

Mr. Schnebly left the highway, still followed by the deputy. RP 44-45. Mr. Schnebly continued to drive at speeds of roughly 50 to 60 miles an hour. RP 53. Mr. Schnebly came to a stop when he drove onto a road which stopped in a dead end. RP 53. As Mr. Schnebly was stopping, his break lights came on, and his car skidded, as his wheels caught upon dry leaves covering the road. RP 53. His car hit a tree at a low speed. RP 53.

Dep. McGee was able to maintain sight of Mr. Schnebly's car during the pursuit. RP 63. The officer testified he was able to match Mr. Schnebly's speed and that Mr. Schnebly "driving wasn't very fast." RP 63. The deputy said he would have ceased the pursuit if the pursuit became dangerous. RP 66-67. He agreed both he and his supervisor did not think they should terminate the pursuit. RP 66-67.

2. *The court failed to properly instruct the jury on the essential element of endangerment.*

At the close of the State's case, Mr. Schnebly moved to dismiss the sentencing enhancement. RP 84. The court denied Mr. Schnebly's motion. RP 85.

There was no jury instruction defining the terms in the sentencing enhancement. The terms are not defined in the "to convict" instruction. CP 128. Instead, the only instruction the jury had with regard to the sentencing enhancement was contained in the verdict form itself. CP 117. The form asked "was any person, other than the defendant, or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of the defendant during his commission of the crime of attempting to elude a police vehicle?"

Was any person, other than the Defendant, or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of the Defendant during his commission of the crime of attempting to elude a police vehicle?

Special Verdict Form, CP 117.

The special verdict form did not contain the language found in the special allegation statute which requires the State "to prove beyond a reasonable doubt that the accused committed the crime while

endangering one or more persons other than the defendant or the pursuing law enforcement officer.” RCW 9.94A.834(2).

Mr. Schnebly was convicted of attempting to elude a police vehicle. CP 118. The jury also found a person, other than the defendant or a pursuing law enforcement officer, had been threatened with physical injury or harm by Mr. Schnebly’s attempt to elude a police vehicle. CP 37. In addition to a standard range sentence of twenty five months, the court imposed the sentencing enhancement of twelve months and one day. CP 17.

E. ARGUMENT

1. THE FAILURE TO REQUIRE THE STATE TO PROVE OTHER PERSONS “WERE ENDANGERED” BY MR. SCHNEBLY’S ACTIONS RELIEVED THE STATE OF ITS BURDEN OF PROVING EVERY ELEMENT OF FELONY ELUDING AND THE SENTENCING ENHANCEMENT BEYOND A REASONABLE DOUBT.

a. Due process requires the State to prove all essential elements of a crime beyond a reasonable doubt.

The special allegation of endangerment by eluding a police officer charged against Mr. Schnebly is an essential element of the crime charged against Mr. Schnebly. *See* RCW 9.94A.834.

The Due Process Clause protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. O’Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing U.S. Const. amend. 14; Const. art. I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

Due process is violated when the trial court’s instructions relieve the State of its burden of proving all elements of a crime beyond a reasonable doubt. U.S. Const. amend 14; Const. art I, § 22; *see also State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). “What the factfinder must determine to return a verdict of guilty is prescribed by

the Due Process Clause.” *State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785 (2013) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). A challenge to the elements of an offense constitutes manifest constitutional error. *State v. Dow*, 162 Wn. App. 324, 330, 253 P.3d 476 (2011); *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

A sentencing enhancement which increases the punishment beyond the authorized sentence for an offense must be proven beyond a reasonable doubt. *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). Both the federal and state constitutions require a sentencing enhancement to be proven beyond a reasonable doubt. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010) (citing U.S. Const. amend. 6; Const. art. I, §§21-22).

When the State proves endangerment by eluding a police officer, the court is required to impose an additional twelve months and a day when a person is convicted of eluding a police officer. RCW 9.94A.530(11). Because this enhancement increases the sentence beyond the authorized range, due process applies and it must be proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 497, 120 S. Ct. 2348, 2366, 147 L. Ed. 2d 435 (2000).

b. The failure to properly define the special allegation of endangerment of a police vehicle relieved the State of proving an essential element of the crime charged against Mr. Schnebly.

The jury's instructions on whether Mr. Schnebly endangered persons other than himself and pursuing law enforcement were insufficient because they failed to allege the essential element of endangerment. *See* CP 117. Instead, the special verdict form merely defined when the State may file a special allegation of endangerment, rather than when it is proven beyond a reasonable doubt. CP 117.

RCW 9.94A.834 permits the State to file a special allegation of endangerment by eluding where there is evidence the person charged with eluding a police officer *threatened physical injury or harm* to persons other than the pursuing officer. RCW 9.94A.834(1). The enhancement may not be imposed, however, unless the State is able to prove beyond a reasonable doubt the eluding *endangered* one or more persons other than the pursuing officer and the person charged. RCW 9.94A.834(b). Because the legislature did not define "physical injury or harm" or "endangered", this Court should look to their plain meaning to determine whether the legislature intended for these different words to mean the same thing.

When interpreting a statute, the “fundamental objective” of the court is to give effect to the intent of the legislature. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015) (citing *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012)). Where the statute’s meaning is plain on its face, the court must give that meaning “as an expression of legislative intent.” *Id.* (citing *State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876 (2010)). Courts determine a statute’s plain language by looking to the text of the statute, its context, related provisions and the statutory scheme as a whole. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Statutes must be interpreted so that all the language used is given effect, “with no portion rendered meaningless or superfluous.” *State v. J.P.*, 149 Wn.2d 444, 4350, 69 P.3d 318 (2003).

The terms “threatened physical injury or harm” and “endangered” are not defined in the statute. Where a term is not defined, courts give the terms its plain and ordinary meaning, unless contrary legislative intent is indicated. *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920–21, 969 P.2d 75 (1998).

“Threaten” is defined as (1) “to say that you will harm someone or do something unpleasant or unwanted especially in order to make someone do what you want or (2) to be something that is likely to cause

harm to (someone or something): to be a threat to (someone or something)” Merriam-Webster’s Learner’s Dictionary.¹

“Harm” is defined as “physical or mental damage or injury: something that causes someone or something to be hurt, broken, made less valuable or successful, etc.” Merriam-Webster’s Learner’s Dictionary.²

“Endanger” is defined as either (1) to bring into danger or peril or (2) to create a dangerous situation. Merriam-Webster’s Learner’s Dictionary.³

While these terms are similar, they are not the same. Endanger describes peril and the creation of a dangerous situation. Neither threat nor harm rises to this level. Instead, these terms define a much lower threshold of unpleasant behavior.

That these terms are different should not be surprising. Allowing the State to file a special allegation where there is some evidence of harm provides the State with the ability to charge the sentencing enhancement and give notice the State intends to seek the enhancement.

¹ Available at <http://www.merriam-webster.com/dictionary/threaten>

² Available at <http://www.merriam-webster.com/dictionary/harm>

³ Available at <http://www.merriam-webster.com/dictionary/endanger>

Requiring greater proof at trial also makes sense. There are few, if any, circumstances where an eluding does not create a threat or harm to others. Requiring a higher standard of proof in order to impose the sentencing enhancement distinguishes between an eluding where there was actual danger and an eluding where there is only the threat of injury or harm. *See* RCW 46.61.024; RCW 9.94A.834.

By failing to properly define “endangerment” in the jury instructions or on the special verdict form, the State was relieved of the burden of proving every essential element of the crime charged. *Jackson*, 443 U.S. at 316; *Brown*, 147 Wn.2d at 339. Instructions which relieve the State of its burden violate due process. *State v. Bennett*, 161 Wn.2d 303, 306-7, 165 P.3d 1241 (2007). This failure to properly define “endangerment” violated Mr. Schnebly’s right to due process.

c. The failure to properly instruct the jury on “endangerment” is constitutional error which requires reversal.

Constitutional instructional error requires reversal unless it affirmatively appears the error was harmless beyond a reasonable doubt. *Brown*, 147 Wn.2d at 341 (citing *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). An instructional error is presumed to have been prejudicial unless it affirmatively

appears it was harmless. *State v. Smith*, 131 Wn.2d 258, 263–64, 930 P.2d 917, 919 (1997) (citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). Where the error is not harmless beyond a reasonable doubt, the *Chapman* standard requires a new trial. *State v. Coristine*, 177 Wn.2d 370, 383, 300 P.3d 400, 406 (2013) (referencing *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

The State cannot demonstrate this instructional error was harmless beyond a reasonable doubt. Had the jury been provided with the higher threshold, it is likely the verdict would have been different.

While Mr. Schnebly's actions were harmful, they do not meet the higher threshold required to find he endangered others. Admittedly, Mr. Schnebly drove in excess of the speed limit, did not stop his car despite being chased by the police, was seen swerving, did not stop at stop signs, and only stopped when he came to a dead end road. RP 34, 35, 45, 51, 51-52.

His actions did not appear, however, to endanger anyone during the pursuit, including his passengers. Dep. McGee acknowledged the police will cease their pursuit of a suspect when the chase becomes dangerous. RP 66-67. The officer stated both he and his supervisor determined the pursuit did not need to be terminated. RP 66-67.

The officer observed Mr. Schnebly “driving wasn’t very fast.” RP 63. Traffic was light. RP 62. There were a few cars on the road when Mr. Schnebly was on the highway, but not when he drove on other roads. RP 42, 62. For most of the time, the deputy was with a few car lengths of Mr. Schnebly. RP 43. The officer did not note any significant damage in his reports and could not testify as to whether Mr. Schnebly’s vehicle had been damaged. RP 67-68.

This instructional error is especially important because it was the only issue contested at trial. RP 101. At the close of the State’s evidence, Mr. Schnebly moved to dismiss the sentencing enhancement because the State had failed to establish Mr. Schnebly endangered anyone. RP 84. Because the State is not able to establish this essential element was supported by uncontroverted evidence, reversal is required. *Brown*, 147 Wn.2d at 341.

2. THE COST OF APPEAL SHOULD NOT BE ASSESSED AGAINST MR. SCHNEBLY SHOULD HE NOT PREVAIL ON HIS APPEAL.

Mr. Schnebly has no realistic ability to pay appellate court costs if they are imposed. Not only did the trial court not impose discretionary costs when he was sentenced because he was indigent, the court also found Mr. Schnebly already owed \$200,000 in financial obligations to the court. RP 126. The likelihood of Mr. Schnebly being able to pay the legal financial obligations already imposed is remote.

Additionally, Mr. Schnebly is recovering from drug addiction. 12/10/15 RP 127. He also has significant criminal history, which will make it even harder for him to find employment when released from incarceration. CP 83; see also *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The inability to pay appellate court costs is an important consideration to take into account in deciding whether to allow costs. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). Because Mr. Schnebly is unlikely to be able to pay appellate court costs, this court should exercise its discretion and decline to award costs if the State substantially prevails.

F. CONCLUSION

The failure to properly instruct the jury on the essential elements of the sentencing enhancement constituted constitutional error requiring reversal. Mr. Schnebly respectfully requests this court order reversal.

DATED this 26th day of August 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 74559-0-I
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DESTRY SCHNEBLY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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