

NO. 44051-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY HOCKLEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson

No. 11-1-05153-8

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....1

1. Has the State presented sufficient evidence for the jury to find that defendant drove his vehicle in a reckless manner while attempting to elude a pursuing police vehicle?1

2. Has defendant failed to preserve his claim regarding the trial court's failure to enter a written order regarding its oral dismissal of count two?1

B. STATEMENT OF THE CASE.1

1. Procedure.....1

2. Facts3

C. ARGUMENT.....5

1. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT DEFENDANT DROVE HIS VEHICLE IN A RECKLESS MANNER WHILE ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.....5

2. DEFENDANT HAS NOT PRESERVED HIS CLAIM REGARDING THE TRIAL COURT'S FAILURE TO ENTER A WRITTEN ORDER REGARDING ITS ORAL DISMISSAL OF COUNT TWO..... 10

D. CONCLUSION.14

Table of Authorities

State Cases

<i>State v. Bertrand</i> , 165 Wn. App. 393, 401, 267 P.3d 511 (2011).....	11
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	6
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999)	11
<i>State v. Gordon</i> , 172 Wn.2d 671, 676, 260 P.3d 884 (2011).....	11
<i>State v. Hernandez</i> , 85 Wn. App. 672, 675, 935 P.2d 623 (1997)	6
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991)	6
<i>State v. Hunley</i> , 161 Wn. App. 919, 253 P.3d 448 (2011)	9
<i>State v. Johnson</i> , 173 Wn.2d 895, 900, P.3d 591 (2012)	6
<i>State v. Lynn</i> , 67 Wn. App. 339, 345, 835 P.2d 251 (1992).....	11
<i>State v. O’Hara</i> , 167 Wn.2d 91, 106, 217 P.3d 756 (2009).....	5
<i>State v. Perez</i> , 166 Wn. App. 55, 269 P.3d 372 (2012).....	9
<i>State v. Priest</i> , 100 Wn. App. 451, 455, 997 P.2d 452 (2000).....	13
<i>State v. Ratliff</i> , 150 Wn. App. 12, 164 P.3d 516 (2007).....	9
<i>State v. Refuerzo</i> , 102 Wn. App. 341, 7 P.3d 847 (2000).....	9
<i>State v. Riley</i> , 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)	10
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	6
<i>State v. Treat</i> , 109 Wn. App. 419, 35 P.3d 1192 (2001).....	9
<i>State v. Yates</i> , 161 Wn.2d 714, 753, 168 P.3d 359 (2007).....	6

Federal And Other Jurisdictions

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602,
16 L. Ed. 2d 694 (1966).....2

Statutes

RCW 46.61.0247
RCW 9.94A.533(11).....3
RCW 9.94A.8341, 3

Rules and Regulations

CrR 7.2(e)13
CrR 7.8(a)13
RAP 2.5(a)10, 11
RAP 7.2(e)13

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has the State presented sufficient evidence for the jury to find that defendant drove his vehicle in a reckless manner while attempting to elude a pursuing police vehicle?
2. Has defendant failed to preserve his claim regarding the trial court's failure to enter a written order regarding its oral dismissal of count two?

B. STATEMENT OF THE CASE.

1. Procedure

On December 27, 2011, the Pierce County Prosecutor's Office charged appellant, Timothy Andrew Hockley, Jr. ("defendant"), by Information with one count of attempting to elude a pursuing police vehicle, and one count of driving while in suspended or revoked status (DWLS) in the third degree. CP 1-2. The State filed a special allegation of endangerment under RCW 9.94A.834 because defendant "endangered one or more persons other than the defendant or the pursuing law enforcement officer" in the commission of the crime. CP 1.

On August 27, 2012, the case proceeded to a jury trial before the Honorable Kathryn J. Nelson. 1 RP 1.¹ Trial began with a 3.5 hearing in which the court ruled that statements defendant made to Pierce County Sheriff's Deputy Matthew Smith after he received and waived his *Miranda*² rights were admissible in the State's case in chief. 1 RP 26.

After the 3.5 hearing, the State asked the court to dismiss the DWLS charge. 1 RP 28. Absent objection, the court orally dismissed the charge. 1 RP 27–28.

After hearing the evidence, the jury convicted defendant of attempting to elude a pursuing police vehicle. 3 RP 186; CP 45. The jury answered "yes" to the special verdict form indicating that defendant's conduct threatened physical injury to any person other than defendant or a pursuing law enforcement officer. CP 46. Prior to sentencing, defendant stipulated to his prior record and the court determined that defendant's offender score was a two. CP 52–53.

On October 5, 2012, the court sentenced defendant to a low-end sentence of 2 months confinement within the standard range of 2–5 months for count one. 4 RP 202; CP 54–66. The court also sentenced defendant to an additional 12 months plus one day confinement under

¹ The State will refer to the verbatim report of proceedings as follows: The four sequentially paginated volumes referred to as 1–4 will be referred to by the volume number followed by RP.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

RCW 9.94A.533(11) because the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834. 4 RP 202; CP 54–66. Defendant's sentences run consecutively. 4 RP 202; CP 54–66.

Defendant filed this timely notice of appeal on October 11, 2012. CP 70.

2. Facts

At approximately 5:53 p.m. on December 24, 2011, Pierce County Sheriff's Deputy Matthew Smith observed a green colored vehicle tailgating a Honda Accord on a two-lane road South of Tacoma, in Midland, WA. 2 RP 76–77. The green car, a Kia, which was "almost touching the bumper" of the Honda, suddenly turned into Deputy Smith's lane of travel. 2 RP 78, 96. Deputy Smith swerved to avoid a collision and then turned his police vehicle around to follow the Kia. 2 RP 77–78.

The Kia, driven by defendant, turned into a residential area with a posted speed limit of either 25 or 35 miles per hour. 2 RP 80. Deputy Smith followed behind with his emergency lights activated.³ 2 RP 80. Defendant did not pull over, but continued to drive and turned onto a different street. 2 RP 81. Deputy Smith activated his sirens and defendant

³ Deputy Smith was driving a white 2006 Crown Victoria police interceptor with an overhead emergency light bar and an emergency siren. 2 RP 74–75.

turned left onto a different street—this time running a stop sign at 35 miles per hour. 2 RP 83. The Kia was unable to sustain the shifting weight of the vehicle throughout the turn, and Deputy Smith observed sparks coming from its front wheel. 2 RP 83. Defendant then increased his speed to 60 miles per hour before slowing to turn left at another stop sign, which he ran at 15 miles per hour. 2 RP 84. Defendant accelerated back to 60 miles per hour and "went into oncoming traffic" to pass a vehicle on the road. 2 RP 84. Defendant continued to exceed the speed limit through residential areas until he parked his vehicle at his girlfriend's mother's house. 2 RP 85.

Deputy Smith ordered defendant out of the vehicle at gunpoint, placed him in handcuffs, and secured him in the back of the police vehicle.⁴ 2 RP 96. Defendant apologized to Deputy Smith and explained that he tried to pass the Honda because it was brake checking him. 2 RP 93–94. Defendant told Deputy Smith that he was arguing with his girlfriend Charlene and that he panicked. 2 RP 93–94. Defendant also told Deputy Smith that, "I fucked up, I was trying to get the car to Charlene's mom's house because I thought you would not be able to tow the vehicle." 2 RP 94. Defendant told Deputy Smith that he eluded

⁴ Deputy Smith was wearing a police uniform. 2 RP 75.

because he might have a warrant for his arrest. 2 RP 94. Finally, defendant told Deputy Smith that he didn't want to go to jail on Christmas. 2 RP 94.

Defendant's girlfriend Charlene Massey was also in the vehicle. 2 RP 93, 129. Deputy Smith testified that Massey was "hysterical, crying." 2 RP 93. At trial, however, Massey testified that defendant was "driving normal" and that she "was never scared." 2 RP 127, 142. According to Massey, defendant never almost collided with Deputy Smith; in fact, Massey testified that the roadway was clear when they tried to pass the Honda. 2 RP 135. Massey also explained that defendant "stopped at stop signs," but then testified that defendant actually performed a "California stop." 2 RP 138. Massey concluded, however, that she was unsure if defendant performed a California stop. 2 RP 138. Massey has known defendant for ten years, and has been dating him for three. 2 RP 129–130.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT DEFENDANT DROVE HIS VEHICLE IN A RECKLESS MANNER WHILE ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

Due process requires the State to prove each and every element of the crime charged beyond a reasonable doubt. *State v. O'Hara*, 167 Wn.2d 91, 106, 217 P.3d 756 (2009). The applicable standard of review in

a challenge to the sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Johnson*, 173 Wn.2d 895, 900, P.3d 591 (2012). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Id.*; see also *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). Both circumstantial and direct evidence are equally reliable. *State v. Yates*, 161 Wn.2d 714, 753, 168 P.3d 359 (2007). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In the present case, defendant was charged with attempting to elude a pursuing police vehicle. A driver of a motor vehicle attempts to elude a police vehicle when he or she:

[...] 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 [...].

RCW 46.61.024.

Here, the jury was instructed that to convict defendant of attempting to elude a police vehicle, the following elements had to be proved beyond a reasonable doubt:

- (1) That on or about the 24th day of December, 2011, 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 20–44; Instruction #6. Elements one, two, three, four, and six are undisputed on appeal.⁵

⁵ Defendant assigns error to the State's alleged failure to prove beyond a reasonable doubt "*all* of the elements" of attempting to elude rather than "*each* of the elements" of the crime. Assignment of Error #1 (*italics added*). It is clear from defendant's brief that defendant only takes issue with element five.

The jury also received the following instruction defining "reckless manner":

To operate a vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.

CP 20–44; Instruction #7.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence for the jury to find defendant guilty of attempting to elude a police officer. Specifically, the State presented sufficient evidence demonstrating that defendant drove his vehicle in a reckless manner while attempting to elude a pursuing police vehicle.

Defendant chose to drive his vehicle dangerously close to the Honda in front of him, such that his Kia was "almost touching [its] bumper." 2 RP 78. Soon thereafter, defendant chose to swerve into oncoming traffic, nearly colliding with Deputy Smith. 2 RP 77–78. Defendant was driving at excessive speeds of 50 to 60 miles per hour through residential areas with posted speed limits of 25 or 25 miles per hour. 2 RP 80. Defendant took a left turn through a stop sign at 35 miles per hour. 2 RP 83. Defendant took a left turn through a second stop sign at 15 miles per hour, slowing down only after his vehicle began to emit sparks. 2 RP 83–84. Defendant sped down a two lane road (one lane in each direction) and, at 60 miles per hour with a police vehicle close behind, chose to enter the opposing lane of traffic to pass a vehicle on the roadway. 2 RP 84. The jury was thus presented with a plethora of

evidence from which it could find beyond a reasonable doubt that defendant drove recklessly.

In support of defendant's argument that his conviction should be reversed, defendant compares his case to three cases in which evidence was sufficient to support a conviction for attempting to elude a pursuing police vehicle: *State v. Perez*, 166 Wn. App. 55, 269 P.3d 372 (2012); *State v. Treat*, 109 Wn. App. 419, 35 P.3d 1192 (2001); and *State v. Refuerzo*, 102 Wn. App. 341, 7 P.3d 847 (2000). Defendant uses these cases to suggest that his reckless driving must occur "in heavy traffic or in the presence of pedestrians"; that defendant must "collide with vehicles"; and that defendant must "accelerate towards an officer or other individual." Brief of Appellant, 9. While the presence of these factors may lead a jury to conclude that a defendant drove recklessly, the absence of any of these factors does not preclude the jury from reaching the same conclusion. See, e.g., *State v. Hunley*, 161 Wn. App. 919, 253 P.3d 448 (2011), and *State v. Ratliff*, 150 Wn. App. 12, 164 P.3d 516 (2007) (in both cases, finding of reckless driving was upheld without evidence of the defendant driving in heavy traffic or in the presence of pedestrians, colliding with vehicles, or accelerating toward an officer or other individual). Indeed, the jury instructions clearly explained that, to drive in a *reckless manner*, meant "to drive in a rash or heedless manner, indifferent to the consequences." CP 20–44; Instruction #7.

Defendant also claims that "the evidence did not prove that [defendant] was trying to elude, or get away from Deputy Smith." Brief of Appellant, 9. This does not view the evidence in the light most favorable to the State. Defendant accelerated away from Deputy Smith on several occasions. 2 RP 83 ln. 11; 2 RP 84 ln. 1; 2 RP 84 ln. 20–21. Defendant made six turns with his vehicle while Deputy Smith's lights were activated. 2 RP 82 ln. 19; 83 ln. 14; 84 ln. 6, 85 ln. 4, 85 ln. 14, 85 ln. 15–16. Indeed, defendant told Deputy Smith that he "panicked" and eluded because he "might have a warrant for his arrest." 2 RP 94. The record plainly indicates that defendant was attempting to elude Deputy Smith.

Here, and viewing the evidence in the light most favorable to the State, the jury's verdict of guilt is supported by the evidence.

2. DEFENDANT HAS NOT PRESERVED HIS CLAIM REGARDING THE TRIAL COURT'S FAILURE TO ENTER A WRITTEN ORDER REGARDING ITS ORAL DISMISSAL OF COUNT TWO.

Arguments not raised in the trial court are generally not considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). However, RAP 2.5(a) provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In determining whether a defendant may raise an issue for the first time on appeal under RAP 2.5(a), the court must first make a cursory determination as to whether the alleged error even suggests a constitutional issue. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If it does, the court must then determine if the error is manifest; that is, if the asserted error had practical and identifiable consequences in the trial of the case. *Id.* at 345. *See also State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (holding that an appellant must show that he or she incurred actual prejudice in order to demonstrate that a constitutional error is manifest). Once the appellant has demonstrated that the error is both constitutional and manifest, the burden shifts to the State to prove that the error was harmless. *State v. Bertrand*, 165 Wn. App. 393, 401, 267 P.3d 511 (2011).

Defendant does not claim any of the three conditions listed under RAP 2.5(a) in which an issue may be raised for the first time on appeal. Rather, defendant relies upon *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999) for the proposition that "illegal or erroneous sentences may be challenged for the first time on appeal." Brief of Appellant, 10. The alleged error in the present case, however, is not an "illegal or erroneous sentence." Defense counsel had "no objection" regarding the trial court's oral dismissal of count two:

THE COURT: Or I can orally dismiss the second count, if there's no objection?

DEFENSE ATTORNEY: No objection.

PROSECUTOR: And at this time, I would ask the Court to dismiss Count II, just DWLS third.

1 RP 27 ln. 25, 1 RP 28 ln. 1-4. The case proceeded to trial without mention of the dismissed count. The dismissed charge is not listed on defendant's judgment and sentence as part of the table of "Current Offenses." CP 54-66 at 56. Defendant was not sentenced on the dismissed charge. CP 54-66.

As noted above, defendant fails to identify anywhere in the record where he presented the court with an order of dismissal or asked the court to sign such an order. Nor does he identify any court rule or statute that imposes an affirmative duty on the trial court to enter a written order in the absence of one of the parties presenting one for entry. He has failed to show an error, much less a constitutional one. Even if the failure to enter a written order dismissing count two suggested a constitutional issue upon which review could be granted for the first time on appeal, the error is not manifest. Indeed, defendant did not suffer prejudice from the pre-trial dismissal of a charge against him, and no negative consequence has flowed from the lack of a written order.

Defendant is not without remedy. Defendant is free to bring a motion pursuant to RAP 7.2(e) for the trial court to consider entering a written order regarding the uncontested dismissal of count two.⁶ RAP 7.2(e) provides, in relevant part, as follows:

The trial court has authority to hear and determine (1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion. The decision granting or denying a postjudgment motion may be subject to review. Except as provided in rule 2.4, a party may only obtain review of the decision on the postjudgment motion by initiating a separate review in the manner and within the time provided by these rules.

CrR 7.2(e).

In sum, defendant has failed to make a prima facie showing that the trial court erred by failing to enter a written order that it was never presented with. This Court should not consider for the first time on appeal a judgment and sentence that was not objected to below, does not affect a

⁶ Defendant could have sought correction of the alleged error pursuant to CrR 7.8(a) prior to review. See *State v. Priest*, 100 Wn. App. 451, 455, 997 P.2d 452 (2000) (stating in dicta that corrections of uncontested clerical mistakes "are best addressed under CrR 7.8(a)" to "avoid the expense, delay, and uncertainty of [an] appeal."

constitutional right, and is not erroneous or illegal. Accordingly, this Court should not consider defendant's request to remand for amendment of the judgment and sentence.

D. CONCLUSION.

For the reasons stated above, the State respectfully asks this Court to affirm defendant's conviction.

DATED: April 25, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

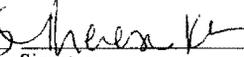


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Chris Bateman
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-IMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-25-13 

Date Signature

PIERCE COUNTY PROSECUTOR

April 25, 2013 - 2:58 PM

Transmittal Letter

Document Uploaded: 440512-Respondent's Brief.pdf

Case Name: St. v. Hockley

Court of Appeals Case Number: 44051-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: **tnichol@co.pierce.wa.us**

A copy of this document has been emailed to the following addresses:
SCCAAttorney@yahoo.com