

No 48457-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

ROBERT HOGAN

BRIEF OF APPELLANT

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A. Assignment of Error

Assignment of Error

The trial court erred by declining to instruct the jury on the lesser-included offense of failure to obey a police officer.

Issue Pertaining to Assignment of Error

Did the trial court error by declining to instruct the jury on the lesser-included offense of failure to obey a police officer when the primary evidence of driving in a reckless manner was speed?

B Statement of Facts

This case involves a prosecution for attempting to elude a pursuing police officer. CP, 1 The sole issue on appeal is whether the trial court erred by declining to give a lesser included offense instruction of failure to obey a police officer, as proposed by the defense. CP, 9 et. seq.

On August 21, 2015, Lewis County Sheriff's Deputy Scott Ferguson had just served some civil papers when he saw a motorcycle make a turn without coming to a complete stop. RP, 29. The motorcycle's headlights and taillights were properly on. RP, 33. He decided to make a traffic stop and activated his emergency lights. RP, 32. Traffic was light

and there were almost no other vehicles on the roadway. RP, 36. The visibility was good. RP, 53. The speed limit on this road is 50 miles per hour RP, 56.

The motorcycle responded by speeding up rapidly. RP, 34. Deputy Ferguson sped up as well, reaching speeds of approximately 90 mile per hour, but was unable to overtake the motorcycle. RP, 34. A short time later, the motorcycle applied its brake lights before making a right hand turn onto Shorey Road. RP, 35. The speed limit on Shorey Road is 35 miles per hour. RP, 57. Later, after a second right turn, Deputy Ferguson decided to discontinue the pursuit because of his concerns for community safety. RP, 40. The distance traveled during the pursuit was between three and four miles. RP, 50. The highest speed achieved by Deputy Ferguson was 105 miles per hour. RP, 44. The motorcycle did not use turn signals during any of the turns. RP, 47. The motorcyclist never lost control of the vehicle. RP, 52.

Throughout the pursuit, Deputy Ferguson was communicating with his "com center" trying to get backup units to assist. RP, 38. After discontinuing the pursuit, he met up with Deputy Jason Mauermann at the corner of Highway 6 and Southwest Riverside. RP, 45. They spoke briefly and then separated in an attempt to locate the motorcycle. RP, 45.

At the intersection of Southwest Riverside and Southwest Newaukum, Deputy Mauermann observed a motorcycle sitting at a full stop with its lights off. RP, 67, 69. After a few moments, the motorcycle “proceeded forward at a high rate of speed ” RP, 70. Deputy Mauermann turned around, activated his emergency lights, and began pursuit of the motorcycle. RP, 71-72. At the intersection of Southwest Newaukum and Riverside the motorcycle made a right-hand turn and the deputy lost sight of it. RP, 73-74.

Deputy Mauermann continued to monitor traffic trying to locate the motorcycle until he reached a house on Southwest Newaukum with a motorcycle lying on its side. RP, 77. Also lying down beside the bike was a person wearing a motorcycle helmet. RP, 77. The man was sitting on his buttocks with his left leg under a portion of the bike. RP, 84. The deputy approached the man in the helmet and asked if he had wrecked and if he was okay. RP, 78. The man took off his helmet and said he was okay. RP, 78. Deputy Mauermann asked why he did not stop for the other deputy and he answered, “It was stupid. It was stupid ” RP, 79. Deputy Mauermann identified the appellant, Robert Hogan, as the driver of the motorcycle. RP, 79

After both sides rested, the trial court held a conference to discuss jury instructions. RP, 115. The defense requested the court instruct on the lesser included offense of failure to obey an officer. RP, 117. The parties all agreed that failure to obey an officer is a lesser included offense of attempt to elude. RP, 117. The parties disagreed, however, on whether the factual prong had been met. RP, 117-18. The trial court concluded the factual prong was not met and declined the proposed instruction. RP, 122.

The jury convicted the defendant of attempt to elude as charged. RP, 178. The court imposed a standard range sentence of 30 days in jail. RP, 188-89; CP, 57. Mr. Hogan filed a timely notice of appeal. CP, 69.

C. Argument

The sole issue in this case is whether the trial court erred by declining to instruct the jury on the lesser included offense of failure to obey a police officer. Washington uses a two part-test to determine whether a lesser-included offense jury instruction is warranted. *State v Workman*, 90 Wn 2d 443, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. Legally, as all the parties and the trial court conceded, failure to obey a police officer is a lesser-included offense of

attempt to elude. RCW 46.61.021-.022; *State v Gallegos*, 73 Wn App. 644, 652, 871 P.2d 621 (1994). The trial court concluded, however, that the factual prong was not established and declined the proffered instruction. This was error.

In 2003, the legislature amended the attempt to elude statute to replace the requirement that the driver drive in “wanton or willful disregard for the lives or property of others” with the requirement that the driver drive in a “reckless manner.” “Reckless manner” is defined as “rash or heedless manner, indifferent to the consequences.” *State v. Ridgley*, 141 Wn.App. 771, 782, 174 P.3d 105 (2007).

The State relied on evidence of turn signal violations and speeding to support its theory that Mr. Hogan was driving in a reckless manner. Whether these violations constituted driving in a reckless manner was an issue best left for the jury. Instead, the trial court usurped the role of the jury by declining the proffered instruction.

Failure to use a turn signal will almost never constitute reckless driving. *State v Montes-Malinas*, 144 Wn. App. 254, 182 P.3d 999 (2008) (failure to turn on headlights for 100 feet not adequate grounds for traffic stop). See, also, generally, Peter Shakow, Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of *Whren v.*

United States, 24 An.J.Crim.L 627, 633 (1997), cited with approval in *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999) (footnote 10).

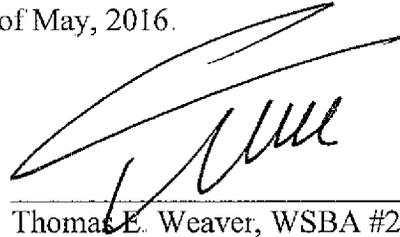
The issue of Mr. Hogan's speed is a more difficult question. The Ninth Circuit has held that speed alone is insufficient to constitute reckless driving and juries should not be instructed on an inference of reckless driving from speed. *Schwendeman v Wallerstein*, 971 F.2d 313 (9th Cir. 1992). While Washington permits juries to be instructed on an inference of reckless driving based upon speed, the instruction is inappropriate when the only evidence of reckless driving is speed. *State v. Hanna*, 123 Wn.2d 704, 871 P.2d 135 (1994), reversed by grant of habeas corpus, *Hanna v. Riveland*, 87 F.3d 1034 (9th Cir. 1996).

Mr. Hogan does not dispute that the evidence is sufficient for a reasonable jury to find that he drove in a reckless manner such that a reversal for insufficient evidence is warranted. But that does not end the inquiry. It was inappropriate for the trial judge to essentially find that his driving constituted driving in a reckless manner as a matter of law such that no reasonable jury could have concluded otherwise. The evidence supports an inference that only the lesser charge of failure to obey an officer was committed.

D. Conclusion

This Court should reverse and remand for a new trial.

DATED this 13th day of May, 2016.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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May 13, 2016 - 4:06 PM

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

STATE OF WASHINGTON,)	Court of Appeals No.: 48457-9-II
)	
Plaintiff/Respondent,)	DECLARATION OF SERVICE
)	
vs.)	
)	
ROBERT HOGAN,)	
)	
Defendant/Appellant.)	

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On May 13, 2016, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated copies of said documents to be sent to Lewis County Deputy Prosecuting Attorney via email to: appeals@lewiscountywa.gov through the Court of Appeals transmittal system.

On May 13, 2016, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

Robert Hogan
2117 Sturgeon Drive
Marysville, WA 98271

////

////

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct

3 DATED: May 13, 2016, at Bremerton, Washington.

4 

5 _____
6 Alisha Freeman

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